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No. ____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

MARVIN POWELL, BRIAN HOLLOWAY, MICHAEL KENN, MICHAEL DAVIS, JAMES LOFTON, MICHAEL LUCKHURST, DAN MARINO, GEORGE MARTIN, and STEVE JORDAN, on behalf of themselves and all class members,

Petitioners,

—v.—

NATIONAL FOOTBALL LEAGUE, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the limited non-statutory labor exemption from the antitrust laws should be expanded to protect anti-competitive restraints unilaterally imposed by employers over vehement union opposition after their collective bargaining agreement has expired?

2. Whether a union must repudiate its status as a collective bargaining representative in order for its individual employee members to maintain an antitrust action against their employers, who have unilaterally imposed unlawful restraints on competition for employees' services without union agreement.

PARTIES TO THE PROCEEDING

Petitioners are Marvin Powell, Brian Holloway, Michael Kenn, Michael Davis, James Lofton, Michael Luckhurst, Dan Marino, George Martin, and Steve Jordan, on behalf of themselves and all class members.

Respondents are National Football League, The Five Smiths, Inc., d/b/a Atlanta Falcons, Buffalo Bills, Inc., d/b/a Buffalo Bills, Chicago Bears Football Club, Inc., d/b/a Chicago Bears, Cincinnati Bengals, Inc., d/b/a Cincinnati Bengals, Cleveland Browns, Inc., d/b/a Cleveland Browns, The Dallas Cowboys Football Club, Ltd., d/b/a Dallas Cowboys, PDB Sports, Ltd., d/b/a Denver Broncos, The Detroit Lions, Inc., d/b/a Detroit Lions, The Green Bay Packers, Inc., d/b/a Green Bay Packers, Houston Oilers, Inc., d/b/a Houston Oilers, Indianapolis Colts, Inc., d/b/a Indianapolis Colts, Kansas City Chiefs Football Club, Inc., d/b/a Kansas City Chiefs, The Los Angeles Raiders, Ltd., d/b/a Los Angeles Raiders, Los Angeles Rams Football Company, Inc., d/b/a Los Angeles Rams, Miami Dolphins, Ltd., d/b/a Miami Dolphins, Minnesota Vikings Football Club, Inc., d/b/a Minnesota Vikings, New England Patriots Football Club, Inc., d/b/a New England Patriots, The New Orleans Saints Limited Partnership, d/b/a New Orleans Saints, New York Football Giants, Inc., d/b/a New York Giants, New York Jets Football Club, Inc., d/b/a New York Jets, The Philadelphia Eagles Football Club, Inc., d/b/a Philadelphia Eagles, Pittsburgh Steelers Sports, Inc., d/b/a Pittsburgh Steelers, B&B Holdings, Inc., d/b/a The Phoenix Cardinals, The Chargers Football Company, d/b/a San Diego Chargers, The San Francisco Forty-Niners, Ltd., d/b/a San Francisco 49ers, The Seattle Professional Football Club, d/b/a Seattle Seahawks, Tampa Bay Area NFL Football, d/b/a Tampa Bay Buccaneers, Pro-Football, Inc., d/b/a Washington Redskins.

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MARVIN POWELL, BRIAN HOLLOWAY, MICHAEL KENN, MICHAEL DAVIS, JAMES LOFTON, MICHAEL LUCKHURST, DAN MARINO, GEORGE MARTIN, and STEVE JORDAN, on behalf of themselves and all class members,

Petitioners,

—v.—

NATIONAL FOOTBALL LEAGUE, et. al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners respectfully request that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered on November 1, 1989.

OPINIONS BELOW

The opinion and judgment of the Court of Appeals is reported at 888 F.2d 559 (8th Cir. 1989) and is set forth in Appendix ("App.") A hereto. The decision of the Court of Appeals denying petitioners' request for a rehearing en banc, including a dissent by Chief Judge Lay, is set forth in App. B

hereto. The relevant opinion of the district court is reported at 678 F. Supp. 777 (D.C. Minn. 1988) and is set forth in App. C hereto.

JURISDICTION

This Court has jurisdiction to review the judgment of the Court of Appeals by writ of certiorari pursuant to 28 U.S.C. § 1254(1).[1]

STATUTORY PROVISIONS INVOLVED

Section one of the Sherman Act, 15 U.S.C. § 1 (1982), provides that:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

STATEMENT OF THE CASE

This case was brought in 1987 as a class action by nine professional football players and the players' then collective bargaining representative, the National Football League Players Association ("NFLPA"). It challenges, under the antitrust laws, the unilateral imposition by the National Football

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1 This petition is timely filed pursuant to an order of Justice Blackmun, dated January 16, 1990, extending the time for filing to and including March 30, 1990. (App. D).

League and its member clubs (the "NFL defendants" or the "NFL owners") of a patently anticompetitive system of restraints, which have the purpose and effect of eliminating virtually all competition among the NFL defendants for player services.

The restraints include: (i) an agreement which prevents any NFL player from moving to another NFL team as a "free agent" after his player contract has expired so long as his original team matches the new team's offer to that player—a so-called "right of first refusal"; and (ii) an additional agreement among the NFL owners requiring the payment of extremely valuable college draft choices as "compensation" to any NFL club which chooses not to exercise its first refusal rights. These restrictions (hereinafter "First Refusal/ Compensation" rights) were originally contained in a now expired collective bargaining agreement, but are currently being unilaterally imposed by the NFL owners without employee consent.

But that is not all. The NFL owners have gone even further and unilaterally agreed to implement a new anticompetitive system called "Plan B," not contained in *any* previous agreement with the players. Among other things, Plan B will impose a league-wide wage scale on all NFL players, the most blatant type of price fixing arrangement, while also eliminating many of the benefits to players which were included in the prior collective bargaining agreement.

In its 2-1 decision, the Court of Appeals ignored controlling decisions of this Court establishing that the antitrust laws prohibit anticompetitive labor market restraints unless approved of by a union in an unexpired labor agreement negotiated in the best interests of employees. *Connell Construction Co.* v. *Plumbers & Steam Fitters Local Union No. 100*, 421 U.S. 616 (1975); *Local Union No. 189, Amalgamated Meat Cutters and Butcher Workmen of North Am.* v. *Jewel Tea Co.*, 381 U.S. 676 (1965); *United Mine Workers of Am.* v. *Pennington*, 381 U.S. 657 (1965). These Supreme Court decisions are based upon two overarching principles:

(i) Congress has enacted a limited statutory labor exemption from the antitrust laws, designed to protect only employee (not employer) activities; and (ii) employers can only derivatively invoke the so-called non-statutory labor exemption to protect the union-employer agreements which are the product of the employee bargaining activities that are protected by the statutory labor exemption.

The Eighth Circuit majority, acting over a strenuous dissent, ignored this Court's precedents and turned these principles on their head. It held that a new labor exemption from the antitrust laws applies indefinitely to employer restraints on competition for employee services—even without union agreement. It essentially created a new "employer" exemption to the antitrust laws and thereby required employees to disband their union and forfeit their collective bargaining rights in order to retain any protection under the antitrust laws.

A. Background of the Litigation

In 1982, the NFLPA and the NFL owners entered into a five-year collective bargaining agreement, which expired by its own terms on August 31, 1987. During its term, the 1982 agreement gave the NFL defendants the First Refusal/Compensation rights described above. In return for this major concession to the owners, the players received, among other things, various financial benefits, including a new severance pay benefit, increased pensions and insurance, and a one-time bonus payment for each player based on years of service.

Although the First Refusal/Compensation rights were a major concession (similar restraints imposed by the NFL owners had previously been held to violate the antitrust laws),[2] the NFLPA hoped that there would still be competi-

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2 In *Mackey* v. *National Football League*, 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977), the Eighth Circuit found that the "Rozelle Rule," authorizing then NFL Commissioner Pete Rozelle to award "compensation" to a player's former team in the form of players from the signing team, violated the Sherman Act.

tion among the NFL clubs for at least some free agent players. However, the First Refusal/Compensation system resulted in the complete elimination of competition among NFL teams for player services, as not one of the over 1,400 so-called "free agent" players who were subject to First Refusal/Compensation rights changed teams through this system during the entire five year term of the 1982 collective bargaining agreement. Moreover, only one of the 1400 even received an offer from another team. In light of these severe anticompetitive effects, the NFLPA determined that, once the 1982 agreement was over, it would never again agree to such a system.

In August of 1987, the 1982 collective bargaining agreement expired. The NFL owners demanded that the union include First Refusal/Compensation rights in a new collective bargaining agreement. The NFLPA refused and, when negotiations broke down, the players went on strike over this "free agency" issue for almost a quarter of the 1987-88 NFL season, losing tens of millions of dollars in salaries and benefits as a result.

Notwithstanding the strike and numerous bargaining sessions, the parties were unable to reach a new collective bargaining agreement. The NFL owners continued to impose, over their employees' strenuous objection, the First Refusal/Compensation system contained in the expired collective bargaining agreement.

B. Proceedings in the District Court

This suit was filed on October 15, 1987, seeking treble damages and injunctive relief against the NFL owners' unilateral imposition of their anticompetitive player restraints. By then, an impasse in the negotiations had been reached and there was nothing that would allow the NFL owners to commit patent antitrust violations without union agreement.

The plaintiffs contended that adherence to the First Refusal/Compensation system constituted an unlawful restraint of trade in violation of the federal antitrust laws, as

mandated by this Court's decision in *Radovich* v. *National Football League*, 352 U.S. 445 (1957). The defendants contended that they were exempt from such a challenge pursuant to the non-statutory labor exemption to the antitrust laws, first enunciated by this Court in *Jewel Tea* and *Pennington*, *supra*. According to the NFL defendants, because their First Refusal/Compensation system had *at one time* been contained in a collective bargaining agreement between the NFLPA and the NFL owners, their continued imposition of these restraints, even without union agreement, was exempt from antitrust challenge.

On November 20, 1987, plaintiffs moved for partial summary judgment on the labor exemption issue and a declaration that upon expiration of the collective bargaining agreement, the non-statutory labor exemption ceased to insulate the NFL owners' player restraints from antitrust scrutiny. Defendants filed a cross motion for summary judgment on the same issue. On January 29, 1988, the district court held that "proper accommodation of labor and antitrust interests" requires that the non-statutory labor exemption for restraints agreed to in a collective bargaining agreement "continue until the parties reach impasse as to that issue." *Powell* v. *National Football League*, 678 F. Supp. 777, 788 (D. Minn. 1988). After an impasse is reached, "the employer runs the risk that continued imposition of the condition will subject the employer to liability." *Id.* The district court reasoned that this rule:

> while lending full respect to labor interests, does not substantially override antitrust concerns. By allowing a labor exemption to survive only until impasse, the law will not insulate a practice from antitrust scrutiny, but will only delay enforcement of the substantive law until continued negotiations over the challenged provision become pointless.

678 F. Supp. at 789.

On June 17, 1988, the district court found that an impasse had been reached on the free agency issues. *See Powell* v.

National Football League, 690 F. Supp. 812, 814 (D. Minn. 1988). On September 16, 1988, and then again on February 18, 1989, the district court certified its January 29, 1988 summary judgment ruling for appellate review pursuant to 28 U.S.C. § 1292(b).

On February 1, 1989, without agreement by the NFLPA or its player members, the NFL defendants imposed a new system, known as "Plan B." This new system had been previously proposed by the NFL defendants in the Fall of 1988 but had *never* been approved in or made part of any union agreement. Rather, the plan had been flatly rejected by the players. Under Plan B, NFL owners "protect" 37 veteran players each year to keep them subject to the anticompetitive First Refusal/Compensation system. Plan B also unilaterally reduced or eliminated the severance, pension and other significant benefits which had been the quid-pro-quo for the union agreeing to First Refusal/Compensation rights in the first place. In addition, under Plan B, the NFL owners agreed among themselves to impose a league-wide wage scale beginning with the 1993 NFL season, thereby eliminating all wage competition and individual negotiation of player contracts. (The NFL's summary of Plan B is attached as App. E hereto). NFL players thus became the targets of a whole new set of anticompetitive restraints without any union agreement or countervailing collective bargaining benefits.

C. The Court of Appeals Proceedings

On February 24, 1989, the Eighth Circuit granted the NFL owners' petition for review. On November 1, 1989, the Eighth Circuit issued its 2-1 decision reversing the district court and directing the entry of judgment against plaintiffs on the principal claims of plaintiffs' complaint. *Powell* v. *National Football League*, 888 F.2d 559 (8th Cir. 1989).[3]

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3 Although other claims remain in the lawsuit, the Court of Appeals' decision represents a final judgment with respect to all of those claims challenging the First Refusal/Compensation system as an unreasonable restraint of trade.

In its decision, the Eighth Circuit majority, over a strenuous dissent by Judge Heaney, held that by once agreeing to anticompetitive restraints in a finite collective bargaining agreement, unionized employees give up their rights to challenge those restraints under the antitrust laws indefinitely. Further, the Eighth Circuit majority held that new variations of employer restraints may be exempt from the antitrust laws when they have been "imposed by the [employers] only after they had been forwarded in negotiations and subsequently rejected by the [employees]." 888 F.2d at 567-68. Therefore, as long as the NFLPA maintains its collective bargaining rights, the NFL defendants would argue that antitrust immunity is extended even to the *per se* unlawful wage scale agreed to among the NFL owners as part of their "Plan B," although never agreed to by the union.

In a vigorous dissent, Senior Circuit Judge Heaney argued that the majority decision does violence to both antitrust and labor law policy. 888 F.2d at 571. As explained by Judge Heaney:

> Under the majority's rule, an agreement to a particular restraint for a *finite* period of time operates to waive, indefinitely or permanently, a union's right to challenge that restraint after the expiration of the agreement under the antitrust laws. The ultimate result is that the majority has intervened to remove the players' rights under the antitrust laws from the bargaining table and has unjustifiably given the owners a continuing right to circumvent the antitrust laws.

888 F.2d at 571 (emphasis in original).

On November 15, 1989, plaintiffs filed a petition for rehearing *en banc* by the Eighth Circuit. That petition was denied on January 17, 1990. However, Chief Judge Lay, the author of the *Mackey* decision, joined by Judge McMillian, filed a strong dissent, pointing out that:

> The panel decision destroys the very foundation of the limits we carefully constructed in *Mackey*. The panel

> majority reasons that, notwithstanding impasse, as long as the restraint was at *one time* contained within a terminated agreement it retains immunity as the 'product' of collective bargaining. Surely this cannot be the law. If the exemption does not end at impasse, when does it end? The majority's view does not accommodate labor policy, it instead offers an employer's Shangri-la of everlasting immunity from the antitrust laws.

(App. B at 30a) (emphasis in original).

The effect of the majority decision is that "the labor exemption will continue until the bargaining relationship is terminated either by a NLRB decertification proceeding or by abandonment of bargaining rights by the union." 888 F.2d at 570. (Heaney J. dissenting). Thus, "[the majority's] unprecedented decision leads to the ineluctable result of union decertification in order to invoke rights to which the players are clearly entitled under the antitrust laws." (App. B at 32a) (Lay C.J., dissenting from denial of rehearing).

As a result of the majority decision, the NFL players have already been forced to make this Hobson's choice: either formally abandon their collective bargaining rights or instead relinquish their rights to be free of unreasonable restraints of trade under the Sherman Act. On November 6, 1989, the NFLPA made the only realistic choice available to it by notifying the NFL defendants that it was abandoning its bargaining rights. (See Letter of Gene Upshaw dated November 6, 1989 attached as App. F).[4] On February 6, 1990, the NFLPA was, by mutual consent, dismissed as a party to this lawsuit.

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4 Unfortunately, this drastic action does not help the NFL players who suffered antitrust injury and damages prior to the NFLPA's resignation as a collective bargaining representative. Only this Court can redress those injuries by granting this petition for certiorari.

REASONS FOR GRANTING THE PETITION

1. As stated by Chief Judge Lay in his dissent from the denial of plaintiffs' petition for rehearing en banc:

> This case is undoubtedly one of the more significant cases this court has confronted in several years. A 2-1 panel opinion now serves as an important precedent of newly-declared law in the accommodation of congressional policies favoring both free competition and collective bargaining. . . . The majority's view does not accommodate labor policy, it instead offers an employer's Shangri-La of everlasting immunity from the antitrust laws.

(App. B at 28a, 30a). This Court should grant certiorari to prevent this "newly-declared" and "everlasting" antitrust immunity from wreaking havoc with antitrust and labor policy.

2. The decision of the Eighth Circuit presents a direct conflict with the principles enunciated by this Court in creating and interpreting the non-statutory labor exemption. Up until now, all such decisions have held that this limited antitrust exemption can only be applied to effectuate the purposes of the statutory labor exemption enacted by Congress—*i.e.* to protect *agreements* entered into by employers with unions in order to further the interests of employees. *Connell Construction Co.* v. *Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616 (1975); *Local Union No. 189, Amalgamated Meat Cutters and Butcher Workmen of North Am.* v. *Jewel Tea Co.*, 381 U.S. 676 (1965); *United Mine Workers of Am.* v. *Pennington*, 381 U.S. 657 (1965). By allowing the non-statutory labor exemption to be used as a sword by employers against their employees *without any union agreement*, the Eighth Circuit has directly undermined the decisions of this Court. As explained long ago by this Court in a related context:

> [B]enefits to organized labor cannot be utilized as a cat's-paw to pull employers' chestnuts out of the anti-trust fires.

United States v. *Women's Sportswear Mfrs. Ass'n*, 336 U.S. 460, 464 (1949).

3. The Court of Appeals decision also flies in the face of decisions of this Court holding that restraints on competition for player services state a valid antitrust claim, *Radovich*, *supra*, and requiring an extremely narrow construction of antitrust exemptions. *See* cases cited *infra* at p. 18. Indeed, what the Court of Appeals majority has done is to expand the non-statutory labor exemption into a virtually unlimited antitrust exemption for employers in unionized industries. But this Court has made it clear that Congress, not the courts, must make such a decision, and has repeatedly held that antitrust and labor law policies should be accommodated. The Court of Appeals decision, by contrast, achieves no accommodation; it simply wipes antitrust policy out of unionized industries. This Court should grant certiorari to decide this overriding federal question relating to the proper accommodation of national antitrust and labor law policy.

4. If certiorari is not granted, the decision of the Eighth Circuit threatens to cause immediate adverse consequences to antitrust and labor law policy not just in professional sports, but in every unionized industry in which there is multi-employer bargaining. In each of these industries, employers would now argue that they are free to agree among themselves to eliminate competition for employees, without union agreement, so long as such restraints are "forwarded" as part of the collective bargaining process. If this argument is accepted, the only remedy of unionized workers who wish to retain their antitrust rights would be to follow the path of the NFLPA and abandon collective bargaining—a result which directly undermines the labor law policy that the Eighth Circuit majority purported to defend.

I. The Court of Appeals Decision Directly Conflicts With Decisions Of This Court Construing The Limited Scope Of The Non-Statutory Labor Exemption

1. There can be no question that, absent a non-statutory labor exemption, the NFL's First Refusal/Compensation system and wage scale violate the federal antitrust laws. This Court long ago recognized the anticompetitive effects of restraints on player services in professional sports, holding that player complaints against such restrictions state a valid antitrust cause of action. *Radovich v. National Football League*, 352 U.S. 445 (1957). Every lower court to consider the issue since that time has found such player restraints to be patent antitrust violations.[5]

The Eighth Circuit's decision avoided this conclusion by holding that the NFL defendants' unilaterally-imposed restraints were shielded from antitrust scrutiny by the non-statutory labor exemption. But in so doing, the decision conflicts with the most basic premise of this Court's opinions establishing the non-statutory exemption. For, whatever its contours, the *sine qua non* for application of the nonstatutory labor exemption is a union-employer *agreement*.

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5 *See e.g.*, *Smith* v. *Pro-Football*, 593 F.2d 1173, 1183-89 (D.C. Cir. 1978) (National Football League's college player draft violates the Sherman Act); *Mackey* v. *National Football League*, 543 F.2d 606, 620-22 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977) (NFL "Rozelle Rule," requiring team that signs a free agent to compensate player's former team, violates the Sherman Act); *Robertson* v. *National Basketball Ass'n*, 389 F. Supp. 867, 890-91 (S.D.N.Y. 1975) ("practically all of the intra- and inter-league restraints appear to be *per se* violative of the Sherman Act"); *Kapp* v. *National Football League*, 390 F. Supp. 73, 82 (N.D. Cal. 1974), *aff'd*, 586 F.2d 644 (9th Cir. 1978), *cert. denied*, 441 U.S. 907 (1979) (NFL college draft and other player restraints held to violate the Sherman Act); *Philadelphia World Hockey Club, Inc.* v. *Philadelphia Hockey Club, Inc.*, 351 F. Supp. 462, 467 (E.D. Pa. 1972) (preliminarily enjoining, as a violation of the Sherman Act, enforcement of National Hockey League reserve clause preventing players whose contracts have expired from negotiating for their services both within the NHL and outside the league); *Denver Rockets* v. *All-Pro Management Inc.*, 325 F. Supp. 1049, 1058 (C.D. Cal. 1971) (NBA draft rules preliminarily enjoined as likely *per se* violations).

2. The non-statutory labor exemption was derived by this Court from the statutory exemption, which "has its source in the strong labor policy favoring the association of employees." *Connell*, *supra*, 421 U.S. at 622. As set forth in Section 6 of the Clayton Act, the statutory exemption protects employee groups when they are engaged in organizing and collective bargaining activities.[6] By its terms, the statutory exemption can never be invoked by employers, whether acting alone or in concert with employees.

It is in this context that this Court came to afford a limited non-statutory labor exemption to effectuate the objectives of Congress expressed in the statutory labor exemption—*i.e.*, to protect the legitimate organizing and bargaining activities of employees from the antitrust laws. Specifically, in order to effectuate the employees' goals in collective bargaining, it was necessary to protect both parties to a labor agreement (employees and employers) from antitrust liability for restraints expressly approved of in a collective bargaining agreement negotiated in good faith in the employees' interest. *See Jewel Tea*, *supra*; *Pennington*, *supra*.[7] Put another way, since Congress granted a statutory antitrust exemption to employees to engage in the collective bargaining process, this Court found it necessary to imply a non-statutory exemption to cover the collective bargaining agreements which are the result of that process.

In *Pennington*, a small coal operator alleged that the union defendant had agreed with the larger companies in the industry to impose high wages on smaller, more labor intensive operators in order to eliminate those smaller rivals from the market. Writing for the Court, Justice White affirmed that a

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6 15 U.S.C. § 17 (1982).

7 *See also Carpenters Local Union No. 1846* v. *Pratt-Farnsworth, Inc.*, 690 F.2d 489 (5th Cir. 1982), *cert. denied*, 464 U.S. 932 (1983) (non-statutory labor exemptions can only be applied "where the union has made some sort of agreement with an employer"; like the statutory exemption, it exists "for the benefit of employees and their unions, and offers no shelter for the acts of employers, except perhaps incidentally").

union has an implied non-statutory labor exemption from the antitrust laws to enter into labor *agreements* with a multi-employer bargaining group, and may, if acting in furtherance of the employees' interests, seek to enter into similar agreements with other employers. 381 U.S. at 665. However, the Court held that the union had forfeited its antitrust exemption by agreeing to pursue the anticompetitive interests of the employer group. *Id.* at 668-69.[8]

By contrast, the decision in *Jewel Tea* involved a collective bargaining agreement designed to protect the interests of employees in limiting late night hours, and the non-statutory labor exemption was held applicable to that agreement. In his opinion in the case, Justice White set forth what have come to be recognized as the established parameters of the non-statutory labor exemption: no antitrust liability shall attach to restraints embodied in a union-employer agreement if those restraints advance legitimate employee goals and restrain trade no more than is necessary to achieve those goals. 381 U.S. at 688-90.

In a separate opinion for three members of the majority, Justice Goldberg opined that any employer-union agreement concerning mandatory subjects of bargaining should be immune from antitrust challenge, but this view was rejected by the majority in *Pennington* and could not command a majority in *Jewel Tea*. Rather, Justice White wrote:

> This is not to say that an agreement resulting from union-employer negotiations is automatically exempt

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8 The Court also noted:

> The union's obligation to its members would seem best served if the union retained the ability to respond to each bargaining situation as the individual circumstances might warrant, without being *strait-jacketed by some prior agreement* with the favored employers.

Id. at 666 (emphasis added). The Court thus held the non-statutory exemption inapplicable where the union was "strait-jacketed" by a "prior agreement" constricting its future bargaining with other employers. Equally, the exemption should not allow a prior, expired, collective bargaining agreement to "strait-jacket" a union with respect to future employees, persons who become employed after the once-sanctioned restraint was negotiated and long after it expired by its terms.

> from Sherman Act scrutiny simply because the negotiations involve a compulsory subject of bargaining, regardless of the subject or the form and content of the agreement. . . . [T]here are limits to what a union or an employer may offer or extract in the name of wages, and because they must bargain does not mean that the agreement reached may disregard other laws.

381 U.S. at 664-65. A majority of this Court thus refused to extend the exemption to all union-employer agreements, let alone to restraints being imposed without any union agreement.

3. Consistent with the above principles, until the decision below, no circuit court had ever permitted the non-statutory labor exemption to be used as a sword for unilaterally imposed employer restraints, without union agreement.[9] To the contrary, other lower courts followed this Court's admonition that a "proper accommodation" of antitrust and labor policies:

> requires that some union-employer *agreements* be accorded a limited nonstatutory exemption from antitrust sanctions.

Connell, *supra*, 421 U.S. at 622 (emphasis added).

In the sports context, numerous lower court cases have followed this Court's precedents by recognizing that the rationale of the non-statutory labor exemption is to protect union-employer agreements.[10] "The [labor exemption] shield

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9 In the Eighth Circuit's earlier *Mackey* decision, the court rejected an accommodation between the labor and antitrust laws that would have shielded, under the guise of the non-statutory exemption, all employee restraints relating to mandatory subjects of bargaining, and noted: "That test . . . has never been adopted by a majority of the Supreme Court. Rather, a majority of the Court seems to favor an accommodation less heavily weighted in favor of labor policy." 543 F.2d at 614 n.14.

10 *See, e.g.*, *McCourt* v. *California Sports, Inc.*, 600 F.2d 1193, 1203 (6th Cir. 1979) (restrictions contained in an unexpired collective bargaining

cannot be transmuted into a sword and still permit the beneficiary to invoke the narrowly carved out labor exemption from the antitrust laws. To allow and condone such conduct would frustrate Congress' carefully orchestrated efforts to harmoniously blend together two opposing public policies." *Philadelphia World Hockey Club, Inc.* v. *Philadelphia Hockey Club, Inc.*, 351 F. Supp. 462, 500 (E.D. Pa. 1972). As stated by the court in *Smith* v. *Pro-Football*, 420 F. Supp. 738, 742 (D.D.C. 1976), *aff'd in part, rev'd in part*, 593 F.2d 1173 (D.C. Cir. 1978):

> [I]t seems apparent that the policy of the exemption—allowing the collective bargaining process, proceeding unfettered by antitrust restraints, to determine wages, hours, and terms and conditions of employment—does not require and would not be served by extending the exemption to arrangements imposed unilaterally by employers, merely because such arrangements could at some time be settled upon through mandatory collective bargaining. Indeed, the thrust of the cases is quite the opposite: a scheme advantageous to employers and otherwise in violation of the antitrust laws cannot under any circumstances come within the exemption unless and until it becomes part of a collective bargaining agreement negotiated by a union in its own self-interest.[11]

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agreement were only covered by the non-statutory labor exemption because they met "the good faith, arm's-length requirement"); *Robertson* v. *National Basketball Ass'n*, 389 F. Supp. 867, 890-91 (S.D.N.Y. 1975) (player restraints agreed to by the National Basketball Association members that were not contained in a collective bargaining agreement were not covered by the labor exemption from the antitrust laws and were likely to be held to be *per se* antitrust violations); *Kapp* v. *National Football League*, 390 F. Supp. 73, 85 (N.D. Cal. 1974), *aff'd*, 586 F.2d 644 (9th Cir. 1978), *cert. denied*, 441 U.S. 907 (1979) (non-statutory labor exemption not applicable to NFL college draft and other player restraints which were not approved of in collective bargaining agreement and which violated the antitrust laws).

11 Only in *Bridgeman* v. *National Basketball Ass'n*, 675 F. Supp. 960 (D. N.J. 1987), and the decision of the district court below, has the non-

4. By eviscerating antitrust policy and permitting the non-statutory labor exemption to protect employer restraints without union agreement, the Eighth Circuit decision below poses a direct conflict with the principles set forth by this Court's decisions in *Jewel Tea*, *Pennington* and *Connell*. Certiorari is required to resolve this conflict and to make certain that unionized workers are not unjustifiably deprived of their antitrust rights by this decision.

II. The Court of Appeals Decision Directly Conflicts With This Court's Holdings That Antitrust Exemptions Must Be Narrowly Construed, And Raises Important Questions of Federal Law Which Should Be Decided By This Court

1. In his dissent from the Eighth Circuit's denial of plaintiffs' petition for a rehearing en banc, Chief Judge Lay states that: "This case is undoubtedly one of the more significant cases this court has confronted in several years, [involving] the accommodation of Congressional policies favoring both free competition and collective bargaining." (App. B at 28a). Indeed, the interplay between the antitrust laws and the labor laws has been one of the most hotly debated topics in antitrust scholarship over the last 20 years[12] and one which both

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statutory labor exemption ever been held to extend beyond the expiration of a collective bargaining agreement. Even in *Bridgeman*, however, the court held that the exemption must at the very least end when, as here, further bargaining is of no utility.

> [C]ourts have . . . *reject[ed]* broad arguments that labor principles should automatically override antitrust principles as long as an exclusive bargaining representative is in place, or that the antitrust laws do not reach labor market restraints at all. . . . This facile manner of evading the antitrust laws would discourage unions from entering collective bargaining agreements, since doing so might forever bar them from challenging those restraints in court.

675 F. Supp. at 965-66 (emphasis added). *See also Powell*, *supra*, 678 F. Supp. at 783.

12 *See, e.g.*, *Wood* v. *National Basketball Ass'n*, 809 F.2d 954, 959 (2d Cir. 1987) ("The interaction of the Sherman Act and federal labor legislation

the majority and dissent in *Flood* v. *Kuhn*, 407 U.S. 258, 285, 294 (1972), noted has never been squarely resolved by this Court. The Eighth Circuit majority decision resolves this significant issue in a manner which threatens both antitrust and labor policy and which warrants review by this Court.

2. The Sherman Act has been described by this Court as a "charter of economic liberty," which is "aimed at preserving free and unfettered competition as the rule of trade." *Northern Pacific Ry. Co.* v. *United States*, 356 U.S. 1, 4 (1958). *See also National Collegiate Athletic Ass'n* v. *Board of Regents of the Univ. of Oklahoma*, 468 U.S. 85, 104 n. 27 (1984). Accordingly, limited exemptions to the fundamental national policy embodied in the antitrust laws, such as the labor exemption, are strongly disfavored and must be narrowly construed. *See Group Life & Health Insurance Co.* v. *Royal Drug Co.*, 440 U.S. 205, 231 (1979); *Union Labor Life Ins. Co.* v. *Pireno*, 458 U.S. 119, 126 (1982); *United States* v. *McKesson & Robbins, Inc.*, 351 U.S. 305, 316 (1956). In construing other statutory schemes, "courts must be hesitant to conclude that Congress intended to override the fundamental national policies embodied in the antitrust laws." *Federal Maritime Comm'n* v. *Seatrain Lines, Inc.*, 411 U.S. 726, 733 (1973). *See also Kaiser Steel Corp.* v. *Mullins*, 455 U.S. 72, 88 (1982); *United States* v. *Philadelphia Nat'l Bank*, 374 U.S. 321, 350-51 (1963).

The Eighth Circuit decision, as Chief Judge Lay points out, "substantially amends the antitrust laws. In doing so, it ignores the Supreme Court's admonition that 'exemptions from antitrust laws are to be narrowly construed.' " (App. B at 32a) (citing *Royal Drug*, *supra*). Indeed, the Eighth Circuit's decision not only fails to narrowly construe the labor exemption in accordance with its original congressional pur-

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is an area of law marked more by controversy than by clarity"); *Continental Maritime of San Francisco, Inc.* v. *Pacific Coast Metal Trades Dist. Council*, 817 F.2d 1391, 1393 (9th Cir. 1987) ("Neither this circuit nor the Supreme Court has enunciated a general rule by which the multiple concerns underlying labor policy and antitrust policy can be accommodated . . . .").

poses, it judicially creates a new "employer exemption" to the antitrust laws, the effect of which—shielding the antitrust violations of employers without union agreement—directly defies that congressional intent.

This Court has made it clear that the judiciary may not usurp such a legislative function:

> In almost any statutory scheme, there may be a need for judicial interpretation of ambiguous or incomplete provisions. But the authority to construe a statute is fundamentally different from the authority to fashion a new rule or to provide a new remedy which Congress has decided not to adopt.

Texas Indus. Inc. v. *Radcliff Materials, Inc.*, 451 U.S. 630, 646 (1981) (quoting from *Northwest Airlines, Inc.* v. *Transp. Workers Union of Am.*, 451 U.S. 77, 97 (1981)). *See also Flood, supra*, 407 U.S. at 281-84. If sports team owners, or any other employer-competitors, want to seek a "new" labor exemption to protect employer restraints imposed without union agreement then their remedy is to go to Congress to seek a new law. *See, e.g., National Soc'y of Professional Engrs.* v. *United States*, 435 U.S. 679, 689-90 (1978); *Flood, supra*, 407 U.S. at 281-84 (1972); *Radovich, supra*, 352 U.S. at 462.

3. Congress has consistently refused sports team owners' requests for special exemptions from the antitrust laws. *See Flood, supra*, 407 U.S. at 281-82; *Radovich, supra*, 352 U.S. at 461 n.7; *United States* v. *International Boxing Club of N.Y.*, 348 U.S. 236, 243-244 (1955). And, the argument that "the business of organized professional football was not intended by Congress to be included within the scope of the antitrust laws" was first raised 33 years ago by the NFL owners and specifically rejected by this Court in *Radovich, supra* 352 U.S. at 449-450. That determination was cited with approval 15 years later in *Flood, supra*, 407 U.S. at 282-83.

Just this Term, this Court reiterated that agreements among competitors eliminating wage competition are *per se*

unlawful and that only Congress, not the courts, may consider purported social or other justifications for such restraints. *Federal Trade Comm'n* v. *Superior Court Trial Lawyers Ass'n*, 110 S. Ct. 768 (1990). Yet, the Eighth Circuit's decision shields from antitrust scrutiny virtually the complete elimination of such competition through the NFL defendants' anticompetitive restraints.

By ignoring this Court's decisions and creating an indefinite exemption from the antitrust laws for unilaterally imposed employer restraints, the Court of Appeals has defied all principles of judicial restraint. The decision is a dangerous precedent for judicial construction of the antitrust laws, warranting review by certiorari on this ground alone.

4. Certiorari should also be granted because the Eighth Circuit's decision conflicts with the repeated holdings of this Court that unionized employees are not deprived of their other statutory rights by virtue of collective bargaining. *See, e.g., Fort Halifax Packing Co., Inc.* v. *Coyne*, 482 U.S. 1 (1987); *W.R. Grace & Co.* v. *Local Union 759, Int'l Union of United Rubber Workers*, 461 U.S. 757, 766 (1983). For example, this Court has held that the rights created by federal minimum wage legislation and anti-discrimination statutes are applicable to unionized employees; and that a union member may bring an action in federal court to vindicate these statutory rights notwithstanding any conflicting provisions in an extant or expired collective bargaining agreement. *See, e.g., Barrentine* v. *Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 737-39 (1981); *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 51 (1974).

"[I]t never has been argued successfully that minimal labor standards imposed by other *federal* laws were not to apply to unionized employers and employees." *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U.S. 724, 755 (1985) (emphasis in original). This same reasoning applies *a fortiori* to the federal

antitrust laws, which this Court has held to be of paramount national importance.

III. The Court of Appeals Decision Poses An Immediate Threat To Competition And Labor Law Policy In Many Industries Throughout The Country

1. Finally, certiorari should also be granted because the Eight Circuit's decision threatens to cause immediate adverse consequences in unionized industries with respect to both antitrust and labor policy. Not only will this decision undermine antitrust policy (as discussed in Point II above), but it will undermine labor policy by forcing those unions who want to vindicate their employees' antitrust rights to forfeit their separate rights to collective bargaining.

2. The Eighth Circuit decision will have immediate and irreparable consequences in both the billion dollar professional football industry and all other professional sports in which unions have previously existed. This includes professional basketball, where the labor exemption issue has been litigated twice,[13] and professional hockey where it has also been litigated.[14] The anticompetitive effects of this exemption are particularly severe in these professional sports because there is only one league of sports team owners in each of these markets which monopolizes the competition for players' services.[15] Since players in these sports have no other alterna-

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13 *Bridgeman* v. *National Basketball Ass'n*, 675 F. Supp. 960 (D.N.J. 1987); *Robertson* v. *National Basketball Ass'n*, 389 F.Supp 867 (S.D.N.Y. 1975).

14 *See McCourt* v. *California Sports, Inc.*; 600 F.2d 1193 (6th Cir. 1979); *Philadelphia World Hockey Club, Inc.* v. *Philadelphia Hockey Club, Inc.*, 351 F.Supp. 462 (E.D. Pa. 1972). Baseball, of course, has been held exempt from the antitrust laws for peculiar historical reasons. *See Flood* v. *Kuhn*, 407 U.S. 258 (1972). This holding has been described by this Court in *Flood* as "an exception," "an anomaly," and "an aberration". 407 U.S. at 282.

15 *Cf. United States Football League* v. *National Football League*, 644 F. Supp. 1040, 1042 (S.D.N.Y. 1986) (NFL defendants found to have unlaw-

tive for pursuing their professions, they are left to the anticompetitive whims of the owners who monopolize these sports.

The Eighth Circuit's decision has already had the effect of forcing employees in the NFL to give up their collective bargaining rights—a result that directly contradicts national labor policy. Unless this Court grants certiorari to review this decision, similar choices are likely to be forced upon the players in professional basketball and hockey when their collective bargaining agreements expire. Employee-athletes in these industries should not be forced to make the Hobson's choice between their antitrust and collective bargaining rights—a choice compelled by the Eighth Circuit decision.

3. But the consequences of the Eighth Circuit decision go beyond professional sports. The decision affects the balance between antitrust and labor law policy in any labor market where multiemployer bargaining takes place. According to the most recent available statistics, there were over 1,500 collective bargaining agreements covering 1,000 employees or more. Of these, over 600 (approximately 42%) were multiemployer agreements, covering well over three million employees.[16] Industries where multiemployer bargaining is common include the construction, retail, food, apparel, manufacturing, transportation, hotel and restaurant industries. *Id.* Employers in any of these industries will argue that the rationale of the Eighth Circuit's decision allows them to conspire to fix wages or impose any other anticompetitive labor market restrictions, without employee agreement, so long as such restrictions are "forwarded" in collective bargaining discussions and the employees refuse to surrender their collective bargaining rights.

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fully monopolized professional football), *aff'd on other grounds*, 842 F.2d 1335 (2d Cir. 1988).

16 "Characteristics of Major Collective Bargaining Agreements, January 1, 1978," U.S. Dept of Labor, Bureau of Labor Statistics, Bull. 2065, April 1980 (cited in *Charles D. Bonanno Linen Service, Inc.* v. *NLRB*, 454 U.S. 404, 410 n. 4 (1982). (Excerpt attached as Exh. G).

The existence of anticompetitive labor market restraints imposed by employers in non-sports industries is not idle speculation. In the past, many cases have involved illicit attempts by employers to impose anticompetitive restrictions in a labor market. For example, in *Nichols* v. *Spencer Int'l Press, Inc.*, 371 F.2d 332 (7th Cir. 1967), encyclopedia publishers entered into "no-switching" agreements under which employers agreed not to employ a former employee of another company until six months after that employee's termination. The Seventh Circuit held a complaint against such an agreement to state a claim under the antitrust laws, and noted that: "[I]t seems clear that agreements among supposed competitors not to employ each other's employees not only restrict freedom to enter into employment relationships, but may also, depending upon the circumstances, impair full and free competition in the supply of a service or commodity to the public." 371 F.2d at 336.[17]

Since, under the Eight Circuit's decision, the non-statutory labor exemption is available to employers without union agreement, groups of employers in such industries would now suddenly find themselves free to engage in violations of the antitrust laws with impunity. Unionized workers in those industries would thus be forced to give up their antitrust rights indefinitely or, like the NFLPA, give up their collective bargaining rights.

Moreover, under the Eighth Circuit's decision, employers may now engage in such restraints without providing the quid

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17 *See also Anderson* v. *Shipowners' Ass'n of Pacific Coast*, 272 U.S. 359 (1926) (alleged agreement among shipowners establishing uniform terms and conditions of employment for seamen stated a claim under the antitrust laws); *Ostrofe* v. *H.S. Crocker Co., Inc.*, 740 F.2d 739, 742-44 (9th Cir. 1984), *cert. dismissed*, 469 U.S. 1200 (1985) (boycott of employee by competing manufacturers of paper lithograph labels); *Quinonez* v. *National Ass'n of Sec. Dealers, Inc.*, 540 F.2d 824, 828-29 (5th Cir. 1976) ("no-switching" agreement imposed upon employees of securities dealers); *Union Circulation Co.* v. *FTC*, 241 F.2d 652, 658 (2d Cir. 1957) ("no-switching" agreements in magazine selling industry, which tended to "discourage labor mobility," were "harmful to competition" and violated the Sherman Act); *Cordova* v. *Bache & Co.*, 321 F. Supp. 600, 606 (S.D.N.Y. 1970) (stock exchange brokerage firms conspired to fix commissions paid to sales representatives).

pro quo of benefits which the union bargained for in agreeing to such restraints in a past collective bargaining agreement. The NFL owners' Plan B, for example, attempts to impose both new restraints (the Plan B wage scale) and old restraints (First Refusal/Compensation), but without providing many of the severance pay, pension and other benefits that had been the consideration for the union's limited agreement to some of these restraints in the first place.[18] Under the panel majority's one-sided decision, the consideration obtained by the union is enjoyed for the term of the union-employer agreement only, while the "labor exemption" consideration obtained by the employers survives indefinitely.

4. In sum, the Eighth Circuit's decision poses a grave threat to competition and labor policy in any labor market in which multiemployer bargaining takes place. This Court should grant certiorari to stave off this threat. The panel majority's decision invites all employers to seek the best of both worlds: to secure a union-free workplace while still enjoying antitrust immunity for practices which had been exempted by virtue of their prior inclusion in an expired labor agreement. This result, which would immunize a wide range of trade restraints, radically undercuts both antitrust and labor policy.

Wherever continued enjoyment of antitrust immunity is a leading employer goal—as it certainly is here—allowing such immunity without regard to the lack of a union agreement destroys collective bargaining. If the employers can have their labor exemption cake and eat it too (without union consent), they will have no incentive to come to terms. The panel majority's decision thus renders the union's bargaining right an empty one, better to discard than retain. As Chief Judge Lay put it: "The plain and simple truth of the matter is that the union should not be compelled, short of self-destruction, to accept illegal restraints it deems undesirable. Union decert-

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18 For example, the NFL owners unilaterally terminated severance pay, altered the NFL players' pension plan, altered insurance benefits, and eliminated for many players the 10% salary increase required for a new contract. (*See* App. E.)

ification is hardly a worthy goal to pursue in balancing labor policy with the antitrust laws." (App. B at 32a.)

CONCLUSION

For all of the reasons set forth above, a writ of *certiorari* should issue to review the judgment of the Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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APPENDIX

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 89-5091

Submitted May 12, 1989 Decided Nov. 1, 1989

Rehearing and Rehearing En Banc

Denied Jan. 17, 1990

MARVIN POWELL; Brian Holloway; Michael Kenn; Michael Davis; James Lofton; Michael Luckhurst; Dan Marino; George Martin; Steve Jordan and the National Football League Players Association on behalf of themselves and all class members,

Appellees,

—v.—

NATIONAL FOOTBALL LEAGUE; *et al.*,

Appellants.

Paul J. Tagliabue, Washington, D.C., *for appellants.*

Carol T. Rieger, Minneapolis, Minn., *for appellees.*

Before

JOHN R. GIBSON, and WOLLMAN, *Circuit Judges,*
and HEANEY, *Senior Circuit Judge.*

JOHN R. GIBSON, *Circuit Judge.*

The National Football League appeals from a district court order which denied the League's motion for partial summary judgment, ruling that the nonstatutory labor exemption to the antitrust laws expires when, as here, the parties have reached "impasse" in negotiations following the conclusion of a collective bargaining agreement. This antitrust action was brought by Marvin Powell, eight other professional football players, and the players' collective bargaining representative, the National Football League Players Association (hereinafter the "Players").[1] Although this action also includes claims that both the League's college draft and its continued adherence to its uniform Player Contract constitute unlawful player restraints, the only League practice at issue in this interlocutory appeal is that provision of the Players' collective bargaining agreement establishing a "Right of First Refusal/Compensation" system. These employment terms restrict the ability of players to sign with other teams, a right commonly termed "free agency." On appeal, the League contends that the challenged practices are the product of bona fide, arm's-length collective bargaining and therefore are governed by federal labor law to the exclusion of challenge under the Sherman Act, 15 U.S.C. §§ 1-7 (1982). The Players, on the other hand, argue that the labor exemption to the antitrust laws expires when parties reach "impasse" in negotiations, and that the First Refusal/Compensation system therefore may be challenged as an unlawful restraint of trade. As we conclude that this action is at present governed by federal labor law, and not antitrust law, we reverse.

In 1977, the League and the Players entered into a collective bargaining agreement containing a new system governing veteran free agent players. The First Refusal/Compensation system provided that a team could retain a veteran free agent

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1 Powell is president of the National Football League Players Association. Brian Holloway, Michael Kenn, Michael Davis, James Lofton, Michael Luckhurst, Dan Marino, George Martin, and Steve Jordan are present or former officials of the Players Association.

by exercising a right of first refusal and by matching a competing club's offer. If the old team decided not to match the offer, the old team would receive compensation from the new team in the form of additional draft choices. This system was substantially modified and incorporated into a successor agreement executed in 1982, which was reached at the end of a 57-day strike.

After the 1982 Agreement expired in August, 1987, the League maintained the status quo on all mandatory subjects of bargaining covered by the Agreement, including the First Refusal/Compensation system. In September, 1987, after intermittent negotiations on a successor collective bargaining agreement proved unsuccessful, the Players initiated a strike over veteran free agency and other issues. The strike ended in mid-October, 1987, without producing a new agreement. The Players commenced this antitrust action immediately thereafter, attacking the League's continued adherence to the expired 1982 Agreement.

In late November, 1987, the Players moved for a preliminary injunction to bar the League's twenty-eight constituent football clubs, as members of a multi-employer bargaining unit, from continuing to abide by the terms of the 1982 Agreement on veteran free agent salaries and movement among clubs. The Players also moved for partial summary judgment on the issue of whether the League's continued imposition of the First Refusal/Compensation system was protected by the labor exemption to the antitrust laws, or instead violated sections 1 and 2 of the Sherman Antitrust Act, 15 U.S.C. §§ 1, 2.

On January 29, 1988, the district court held that, after expiration of a bargaining agreement, the labor exemption from the antitrust laws terminates with respect to a mandatory subject of bargaining when employers and a union reach a bargaining impasse as to the contested issue. *Powell v. National Football League*, 678 F.Supp. 777, 788 (D.Minn. 1988) ("*Powell I*"). The court further stated, however, that it would not determine whether a negotiating impasse then existed between the parties until the National Labor Relations Board had passed upon a pending charge by the League

asserting that the Players were not bargaining in good faith. *Id.* at 789. On February 1, 1988, one day after the district court filed its opinion setting forth the impasse standard, the Players advised the League that, in their view, the parties had indeed reached impasse on the free agency issue.

On April 28, 1988, the Office of the General Counsel of the National Labor Relations Board issued two Advice Memoranda declining to issue a complaint against the Players for either bad faith bargaining or failure to meet, and finding that the parties had been at impasse since October 11, 1987. This prosecutorial judgment was based on staff analysis, not on an adversarial hearing on the record. The League nevertheless withdrew its unfair labor practice charge against the Players.

The Players then renewed their motion for a preliminary injunction, contending that the district court should adopt the decision of the General Counsel of the National Labor Relations Board that impasse existed. The district court granted the Players' motion for summary judgment on June 17, 1988, holding that the parties had reached an impasse on the free agency issue as of that date. This ruling opened the doors for a trial on whether the League, in adhering to the First Refusal/Compensation system, had violated the Sherman Act's Rule of Reason. The court declined to issue a temporary injunction, however, reasoning that it lacked jurisdiction to grant injunctive relief in a labor dispute governed by the Norris-LaGuardia Act, 29 U.S.C. §§ 105-15 (1982). *Powell v. National Football League*, 690 F.Supp. 812, 814-15 (D.Minn.1988) ("*Powell II*").

This court granted the League permission to appeal the district court's grant of summary judgment under 28 U.S.C. § 1292(b). The League argues that federal labor laws control exclusively where the challenged "restraint" relates to a mandatory subject of collective bargaining, the restraint has been developed and implemented through the lawful observance of the collective bargaining process, the employees are represented by a union vested with collective bargaining authority, and the restraint affects only a labor market involving the parties to the collective bargaining agreement. According to

the League, such circumstances exist in this case and recourse to antitrust sanctions by a bargaining party such as the Players is incompatible with the purpose and operation of the federal labor laws.

I.

This is not the first time that this court has considered whether a labor exemption shields the League from antitrust liability for the restraints it imposes on its players. In *Mackey v. National Football League*, 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801, 98 S.Ct. 28, 54 L.Ed.2d 59 (1977), the League appealed from a district court ruling that the "Rozelle Rule," a restraint on competition for player services, violated section 1 of the Sherman Act.[2] We first analyzed the statutory labor exemption to the application of the antitrust laws, observing that while the exemption applies to legitimate labor activities unilaterally undertaken by a union in furtherance of its own interest, it does not extend to concerted action or agreements between unions and nonlabor groups such as employers.[3] *Id.* at 611. We further held, however, that employer groups such as the League may invoke the nonstatutory labor exemption to their benefit where there has been an agreement between management and labor with regard to the challenged restraint. *Id.* at 612.

In *Mackey*, we proceeded to analyze the principles which undergird the nonstatutory labor exemption, and the determinative issue of whether relevant federal labor policy was

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2 "The Rozelle Rule essentially provides that when a player's contractual obligation to a team expires and he signs with a different club, the signing club must provide compensation to the player's former team. If the two clubs are unable to conclude mutually satisfactory arrangements, the Commissioner may award compensation in the form of one or more players and/or draft choices as he deems fair and equitable." *Mackey*, 543 F.2d at 609 n. 1.

3 *Mackey* observed that the basic sources of the exemption were sections 6 and 20 of the Clayton Act, 15 U.S.C. § 17 and 29 U.S.C. § 52, and the Norris-LaGuardia Act, 29 U.S.C. §§ 104, 105, and 113. *Mackey*, 543 F.2d at 611.

deserving of preeminence over federal antitrust policy under the circumstances of a particular case. In resolving these competing labor and antitrust interests, we found the proper accommodation to be:

> First, the labor policy favoring collective bargaining may potentially be given preeminence over the antitrust laws where the restraint on trade primarily affects only the parties to the collective bargaining relationship. * * * Second, federal labor policy is implicated sufficiently to prevail only where the agreement sought to be exempted concerns a mandatory subject of collective bargaining. * * * Finally, the policy favoring collective bargaining is furthered to the degree necessary to override the antitrust laws only where the agreement sought to be exempted is the product of bona fide arm's-length bargaining.

Id. at 614 (citations omitted).

In *Mackey*, we determined that the Rozelle Rule satisfied the first two of these factors but not the third. We held that the Rule affected only the parties to the labor agreements sought to be exempted from the antitrust laws, and that it constituted a subject of mandatory bargaining within the meaning of the National Labor Relations Act. *Id.* at 615. The district court found that the Rule, although it was later incorporated into two labor agreements, was not the product of bona fide, arm's-length bargaining, but rather was unilaterally promulgated by the League. Upon review, we concluded that the district court's finding was supported by substantial evidence. We therefore held that the labor agreements between the football clubs and their playees did not qualify for the labor exemption. *Id.* at 615-16.

In so doing, we rejected the League's argument that the Rozelle Rule was exempt from Sherman Act scrutiny as a restraint which affected only player services and not a traditional product market. Distinguishing *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 60 S.Ct. 982, 84 L.Ed. 1311 (1940), we held that the Rule's restraints on competition within the mar-

ket for player services were subject to the scrutiny of the antitrust law.[4] *Mackey*, 543 F.2d at 616-18.

Turning to the issue of whether the Rozelle Rule violated the Sherman Act, we rejected the district court's conclusion that the Rule was per se illegal, reasoning that the challenged restraints were not between business competitors in the traditional sense. *Id.* at 619. We therefore proceeded under a Rule of Reason analysis to hold that the Rozelle Rule was, for many reasons, far more restrictive than necessary to fulfill the legitimate needs of the League, and that it unreasonably restrained trade in violation of section 1 of the Sherman Act. Finally, after carefully noting the limitation of our holding,[5] we urged the League and Players to resolve problems of interteam player transfers through collective bargaining. The result was the 1977 Agreement.

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4 The Supreme Court in *Apex* stated:

> [I]t would seem plain that restraints on the sale of the employee's services to the employer, however much they curtail the competition among employees, are not in themselves combinations or conspiracies in restraint of trade or commerce under the Sherman Act.

310 U.S. at 503, 60 S.Ct. at 997. In *Mackey* we acknowledged that this language seemingly supported the League's defense that a restriction on competition for player services was not the type of restraint proscribed by the Sherman Act. 543 F.2d at 616-17. We nevertheless distinguished *Apex* on the grounds that in that case the Supreme Court condoned restrictions on competition for employee services imposed by the employees themselves, not by the employers. *Id.* at 617. [This footnote appears to be incorrectly reported in *West*'s Federal Reporter.]

5 We stated:

> We note that our disposition of the antitrust issue does not mean that every restraint on competition for players' services would necessarily violate the antitrust laws. Also, since the Rozelle Rule, as implemented, concerns a mandatory subject of collective bargaining, any agreement as to inter-team compensation for free agents moving to other teams, reached through good faith collective bargaining, might very well be immune from antitrust liability under the nonstatutory labor exemption.

Mackey, 543 F.2d at 623.

The Players contend that the League in essence asks this court to overrule *Mackey*. The Players argue that although in the case before us the Players' collective bargaining agreement has expired, the *Mackey* court conditioned its application of the labor exemption upon the existence of an agreement between the union and management and specifically referred to the existence of an agreement in two of its three requirements for invoking the labor exemption. *See Mackey*, 543 F.2d at 614. We cannot accept this interpretation. Our discussion in *Mackey* was couched in terms of "agreements" because in that case we were presented with unlawful restraints which, although initiated years before football players had been represented by a union, had been incorporated by two bargaining agreements. Against those facts, we held that the mere incorporation of unlawful restraints into a collective bargaining agreement without bona fide bargaining was not sufficient to place them beyond the reach of the Sherman Act. *Id.* at 616.

The district court accordingly found that the present case was distinguishable from *Mackey* because the player restraints challenged here were the result of collective bargaining. *See Powell II*, 690 F.Supp. at 815 n. 7. Furthermore, *Mackey* itself expressly reserved the question now before us, stating that "we need not decide whether the effect of an agreement extends beyond its normal expiration date for purposes of the labor exemption." 543 F.2d at 616 n. 18. While we agree with the district court that *Mackey* is not controlling,[6] we feel that the analytic framework which it adopts with respect to the nonstatutory labor exemption must be employed in this case.

On appeal, the parties do not dispute that the terms of the 1977 and 1982 Agreements establishing the First Refusal/Compensation system: (1) primarily affected only the parties

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6 We differ with the dissent's argument that the logic of *Mackey* applied to this case would end the labor exemption at impasse. We believe its language referring to the "agreement sought to be exempted," 543 F.2d at 614, applies to the "product of bona fide arm's-length bargaining," *id.*, before termination and continues afterward, whether to impasse or to some other point in time.

in the collective bargaining relationship; (2) concerned a mandatory subject of collective bargaining; and (3) were the product of bona fide, arms'-length bargaining.[7] Under *Mackey*, therefore, the nonstatutory exemption precluded an antitrust challenge to those restraints while the Agreements were in effect. Now that the 1982 Agreement is terminated, however, we must decide whether the nonstatutory labor exemption has also expired or, alternatively, whether under the circumstances of this case the exemption continues to protect the League from potential antitrust liability.

II.

The district court adopted "impasse" as the point at which the nonstatutory labor exemption expires, holding that "once the parties reach impasse concerning player restraint provisions, those provisions will lose their immunity and further imposition of those conditions may result in antitrust liability." The court reasoned that its impasse standard "respects the labor law obligation to bargain in good faith over mandatory bargaining subjects following expiration of a collective bargaining agreement," and that it "promotes the collective bargaining relationship and enhances prospects that the parties will reach compromise on the issue." *Powell I*, 678 F.Supp. at 789. The League attacks the district court's standard as providing a union, such as the Players, with undue motivation to generate impasse in order to pursue an antitrust suit for treble damages.

In *Charles D. Bonanno Linen Service, Inc. v. NLRB*, 454 U.S. 404, 102 S.Ct. 720, 70 L.Ed.2d 656 (1982), the Supreme Court defined "impasse" as:

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7 Indeed, in *Reynolds v. National Football League*, 584 F.2d 280 (8th Cir. 1978), we affirmed the district court's approval of a settlement in a class action by which the Players challenged the 1977 Agreement and its "First Refusal/Compensation" system, stating that it was "a near certainty that the collective bargaining agreement was the result of 'bona fide arms-length negotiations.' " *Id.* at 288.

> a temporary deadlock or hiatus in negotiations "which in almost all cases is eventually broken, through either a change of mind or the application of economic force." * * * Furthermore, an impasse may be "brought about intentionally by one or both parties as a device to further, rather than destroy, the bargaining process."

Id. at 412, 102 S.Ct. at 725 (quoting *Charles D. Bonanno Linen Service, Inc.*, 243 N.L.R.B. 1093, 1093-94 (1979)). The Supreme Court characterized impasse as a recurring feature in the bargaining process and one which is not sufficiently destructive of group bargaining to justify unilateral withdrawal. The Court agreed with the National Labor Relations Board that "permitting withdrawal at impasse would as a practical matter undermine the utility of multi-employer bargaining." *Id.*

The Players contend that we should accept the district court's impasse test as "inherently balanced." For support, the Players cite the language of *Bridgeman v. National Basketball Association*, 675 F.Supp. 960 (D.N.J.1987), which involved a challenge by professional basketball players to the National Basketball Association's college player draft, salary cap, and right of first refusal:

> Impasse is certainly a plausible point at which to end the labor exemption, for by its very definition it implies a deadlock in negotiations, which could in some cases imply that the employees' consent to the restraints of the prior agreement has ended. The moment of impasse in negotiations is significant, for an employer may, after bargaining with the union to impasse, make "unilateral changes that are reasonably comprehended within his pre-impasse proposals."

Id. at 966 (footnote omitted) (quoting *Taft Broadcasting Co.*, 163 N.L.R.B. 475, 476 (1967), *aff'd sub nom. American Fed'n of Television & Radio Artists v. NLRB*, 395 F.2d 622 (1968)). *Bridgeman* held that the labor exemption survives "only as long as the employer continues to impose that restriction unchanged, and reasonably believes that the prac-

tice or a close variant of it will be incorporated in the next collective bargaining agreement." *Id.* at 967. The Players argue that *Bridgeman* rejected the impasse test, at least in part, on a belief that the labor exemption could expire prior to impasse:

> Because an impasse occurs only when the entire negotiating process has come to a standstill, the prospects for incorporating a particular practice into a collective bargaining agreement may also disappear before a full impasse in the negotiations is actually reached.

Id. The *Bridgeman* standard was rejected by the district court as not giving proper regard to the labor law policy promoting the collective bargaining process, in that this standard would encourage employees to exhibit steadfast, uncompromising adherence to stated terms. *Powell I*, 678 F.Supp. at 787. Instead, the district court suggested that its impasse standard strikes an appropriate balance between labor policy and antitrust policy:

> By allowing a labor exemption to survive only until impasse, the law will not insulate a practice from antitrust scrutiny, but will only delay enforcement of the substantive law until continued negotiations over the challenged provision become pointless.

Id. at 789.

The League concedes that agreements among competing employers to impose salary or other restraints in labor markets may be subject to the Sherman Act when they are imposed outside of the collective bargaining process and without regard to the labor laws. *See Mackey*, 543 F.2d at 617-18 (citing cases where courts have applied the Sherman Act to restraints on competition for players' services imposed by club owners). It argues, however, that the restraints involved in cases supporting this rule were not developed in the collective bargaining process and the employment relationships in those cases were not controlled by the labor laws. The League further recognizes that the antitrust laws may apply to collectively bargained restraints when such agree-

ments directly restrict business competition in product markets. *See Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 625, 95 S.Ct. 1830, 1836, 44 L.Ed.2d 418 (1975). It further contends that product market effects are an essential predicate for applying the antitrust laws, *see id.* at 622, 95 S.Ct. at 1835, and that the employment terms challenged in this case do not impose any such product market restraints. In short, the League argues that in this lawsuit the Players challenge management practices wholly governed by the federal labor laws, and that the Players' sole remedy against such practices lies in the economic pressure that the Players may exert against the League under the labor laws.

Our evaluation of the district court's impasse standard cannot proceed without a firm appreciation of the remedies available under the federal labor laws to the parties involved in labor negotiations or disputes. After the expiration of a collective bargaining agreement, a comprehensive array of labor law principles govern union and employer conduct. For both sides, there is a continuing obligation to bargain. National Labor Relations Act § 8(a)(5), (d), 29 U.S.C. § 158(a)(5), (d) (1982); *see NLRB v. Katz*, 369 U.S. 736, 742-43, 82 S.Ct. 1107, 1111, 8 L.Ed.2d 230 (1962); *Hinson v. NLRB*, 428 F.2d 133, 139 (8th Cir.1970). Before the parties reach impasse in negotiations, employers are obligated to "maintain the status quo as to wages and working conditions." *Producers Dairy Delivery Co. v. Western Conference of Teamsters Trust Fund*, 654 F.2d 625, 627 (9th Cir.1981) (quoting *Peerless Roofing Co. v. NLRB*, 641 F.2d 734, 736 (9th Cir.1981)). Such conduct is often conducive to further collective bargaining and to stable, peaceful labor relations. *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 108 S.Ct. 830, 833 n. 6, 98 L.Ed.2d 936 (1988). After impasse, an employer's continued adherence to the status quo is authorized. At the same time, once an impasse in bargaining is established, employers become entitled to implement new or different employment terms that are reasonably contemplated within the scope of their pre-impasse proposals. *Id.* 108 S.Ct. at 833 n. 5. If

employers exceed their labor law rights in implementing employment terms at impasse, the full range of labor law rights and remedies is available to unions.

The Supreme Court has recognized that disputes over employment terms and conditions are not the central focus of the Sherman Act. For example, in holding that a union did not have standing to assert antitrust claims against a multi-employer bargaining association with which it had a collective bargaining relationship, the Court stated that Congress has developed "a separate body of labor law specifically designed to protect and encourage the organizational and representational activities of labor unions." *Associated Gen. Contractors of Cal. v. California State Council of Carpenters*, 459 U.S. 519, 539-40, 103 S.Ct. 897, 909, 74 L.Ed.2d 723 (1983). Under these laws, a union "will frequently not be part of the class the Sherman Act was designed to protect, especially in disputes with employers with whom it bargains." *Id.* at 540, 103 S.Ct. at 909. In this context, we must decide the extent to which a labor union may employ the antitrust laws to attack restraints imposed by management which are derived from an expired collective bargaining agreement.

A collective bargaining agreement is not always essential to a finding that challenged employment terms fall within the labor exemption. In *Amalgamated Meat Cutters v. Wetterau Foods*, 597 F.2d 133 (8th Cir.1979), employer agreements adopted in response to a strike caused plaintiffs to be denied employment. After first determining that the challenged employer conduct was lawful under the labor laws, *id.* at 135, this court affirmed the dismissal of plaintiffs' treble damage claims:

> Since any injury to [plaintiffs] would flow naturally from the replacement of striking workers, which conduct federal labor policy sanctions, *see [NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 58 S.Ct. 904, 82 L.Ed. 1381 (1938)], the agreement * * * cannot constitute a violation of the antitrust law. Federal labor policy sanctions both the goal of resisting union demands and the method of replacing striking workers and the magnitude

> and nature of any restraint of trade or commerce in this case directly follows from the sanctioned conduct. The agreement had no anticompetitive effect unrelated to the collective bargaining negotiations.

Id. at 136.

Other courts have concluded that in certain circumstances labor market restraints imposed in a collective bargaining context do not raise Sherman Act issues. In *Prepmore Apparel v. Amalgamated Clothing Workers*, 431 F.2d 1004, 1007 (5th Cir.1970), *cert. dismissed*, 404 U.S. 801, 92 S.Ct. 21, 30 L.Ed.2d 34 (1971), the Fifth Circuit held that an employer's refusal to deal with a union with respect to terms of employment was ordinarily governed by the National Labor Relations Act and did not state a claim for violation of the Sherman Act. Similarly, in *Mid-America Regional Bargaining Association v. Will County Carpenters*, 675 F.2d 881, 893 (7th Cir.), *cert. denied*, 459 U.S. 860, 103 S.Ct. 132, 74 L.Ed.2d 114 (1982), the Seventh Circuit held that an escrow agreement which was implemented after a collective bargaining agreement expired was protected by both the statutory and nonstatutory labor exemptions. *See also Richards v. Neilsen Freight-Lines*, 810 F.2d 898, 905 (9th Cir.1987) (noting that the nonstatutory exemption is not "limited to restraints imposed by collective bargaining agreements").

While the League invites us to read these cases as establishing a rule to the effect that the Sherman Act is concerned only with product markets and not those for player services, we need not read them so broadly. We do, however, interpret them as precedent supporting the proposition that, in certain circumstances, such as in this case, the nonstatutory labor exemption may be invoked even after a collective bargaining agreement has expired.

Our reading of the authorities leads us to conclude that the League and the Players have not yet reached the point in negotiations where it would be appropriate to permit an action under the Sherman Act. The district court's impasse

standard[8] treats a lawful stage of the collective bargaining process as misconduct by defendants, and in this way conflicts with federal labor laws that establish the collective bargaining process, under the supervision of the National Labor Relations Board, as the method for resolution of labor disputes.

In particular, the federal labor laws provide the opposing parties to a labor dispute with offsetting tools, both economic and legal, through which they may seek resolution of their dispute. A union may choose to strike the employers, *see, e.g., NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 82 S.Ct. 1099, 8 L.Ed.2d 298 (1962), and the employer may in turn opt to lock out its employees. *See, e.g., American Ship Building Co. v. NLRB*, 380 U.S. 300, 85 S.Ct. 955, 13 L.Ed.2d 855 (1965). Further, either side may petition the National Labor Relations Board and seek, for example, a cease-and-desist order prohibiting conduct constituting an unfair labor practice. *See, e.g., Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 59 S.Ct. 206, 83 L.Ed. 126 (1938). To now allow the Players to pursue an action for treble damages under the Sherman Act would, we conclude, improperly upset the careful balance established by Congress through the labor law.

Both relevant case law and the more persuasive commentators establish that labor law provides a comprehensive array of remedies to management and union, even after impasse. After a collective bargaining agreement has expired, an employer is under an obligation to bargain with the union before it may permissibly make any unilateral change in terms and conditions of employment which constitute mandatory subjects of collective bargaining. *Hinson*, 428 F.2d at 137. After impasse, an employer may make unilateral changes that are reasonably comprehended within its pre-impasse proposals. *Laborers Health*, 108 S.Ct. at 833 n. 5 (quoting *Taft Broadcasting Co.*, 163 N.L.R.B. 475, 478

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8 As the dissent suggests, there may well be no impasse at this time. The district court carefully defined its determination as to impasse as to the single issue of player restraint provisions, even though, as the dissent points out, negotiations continue as to other issues.

(1967), *aff'd sub nom. American Fed'n of Television & Radio Artists v. NLRB*, 395 F.2d 622 (1968)). We are influenced by those commentators who suggest that, given the array of remedies available to management and unions after impasse, a dispute such as the one before us "ought to be resolved free of intervention by the courts" where "the union has had a sufficient impact in shaping the content of the employer's offers" and where the challenged restraint is "clothed with union approval." J. Weistart & C. Lowell, *The Law of Sports* § 5.06, at 590 (1979). In the words of Professors Berry and Gould:

> A rule withdrawing immunity because the previous contract expired before a new agreement was reached is contrary to national labor law. The parties would be forced to enter into a collective bargaining agreement to avoid antitrust sanctions, when labor law is opposed to any such requirement. On the other hand, the employer cannot alter its stance subsequent to an impasse in negotiations and unilaterally impose a package different from that which has been on the bargaining table. Such action would be a refusal to bargain and an unfair labor practice by the employer.
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> What seems appropriate is that the employer's position emerged from the collective bargaining process. Good faith bargaining must occur, even to the point of impasse, regardless of the lack of substantive influence of the union's proposals in the negotiations. If an impasse occurs and the employer's unilateral terms were offered to the union, the employer should be deemed not to have violated any labor law.

Berry & Gould, *A Long Deep Drive to Collective Bargaining: Of Players, Owners, Brawls, and Strikes*, 31 Case W.Res.L.Rev. 685, 774 (1981). And as Judge Winter has said, "no one seriously contends that the antitrust laws may be used to subvert fundamental principles of our federal labor policy as set out in the National Labor Relations Act." *Wood v. National Basketball Ass'n*, 809 F.2d 954, 959 (2d

Cir.1987). To allow the claim here asserted by the Players would, we conclude, be inconsistent with federal labor policy.[9] *See generally* Jacobs & Winter, *Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage*, 81 Yale L.J. 1 (1971).

The labor arena is one with well established rules which are intended to foster negotiated settlements rather than intervention by the courts. The League and the Players have accepted this "level playing field" as the basis for their often tempestuous relationship, and we believe that there is substantial justification for requiring the parties to continue to fight on it, so that bargaining and the exertion of economic force may be used to bring about legitimate compromise.

The First Refusal/Compensation system, a mandatory subject of collective bargaining, was twice set forth in collective bargaining agreements negotiated in good faith and at arm's-length. Following the expiration of the 1982 Agreement, the challenged restraints were imposed by the League only after they had been forwarded in negotiations and subsequently rejected by the Players.[10] The Players do not contend that these proposals were put forward by the League in bad faith. We therefore hold that the present lawsuit cannot be maintained under the Sherman Act. Importantly, this does not entail that once a union and management enter into collective bargaining, management is forever exempt from the antitrust

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9 The dissent assumes that the contractually created "Right of First Refusal/Compensation" system is a violation of the antitrust law. This contractual provision was spawned in collective bargaining, and as it is the product of a labor relationship, we cannot agree that it should be considered a violation of antitrust laws.

10 On November 17, 1988, the League delivered two proposals to the Players. The first of these modified players benefits but maintained the First Refusal/Compensation system for all players, and strongly resembled a management proposal of September 7, 1987, that the players had rejected before striking. The second proposal, which offered free agency to some players but retained the First Refusal/Compensation system for many others, was similar to a management proposal offered to the Players in September and October of 1987. After the Players had rejected both proposals, the League implemented a new "free agency" system effective February 1, 1989, which was substantially identical to the terms of the second proposal.

laws, and we do not hold that restraints on player services can never offend the Sherman Act. We believe, however, that the nonstatutory labor exemption protects agreements conceived in an ongoing collective bargaining relationship from challenges under the antitrust laws.[11] "[N]ational labor policy should sometimes override antitrust policy," *Continental Maritime of San Francisco v. Pacific Coast Metal Trades Dist. Council*, 817 F.2d 1391, 1393 (9th Cir.1987) (citing *Connell Constr.*, 421 U.S. at 622, 95 S.Ct. at 1835), and we believe that this case presents just such an occasion.[12]

Upon the facts currently presented by this case, we are not compelled to look into the future and pick a termination point for the labor exemption. The parties are now faced with several choices. They may bargain further, which we would strongly urge that they do. They may resort to economic force. And finally, if appropriate issues arise, they may present claims to the National Labor Relations Board. We are satisfied that as long as there is a possibility that proceedings may be commenced before the Board, or until final resolution of Board proceedings and appeals therefrom, the labor relationship continues and the labor exemption applies.[13] Since the matter before us concerns an interlocutory

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11 The dissent argues that the court's action today deprives the union of the threat of antitrust laws, "the antitrust lever" and removes this issue from the bargaining table. This is precisely the thrust of the nonstatutory labor exemption to the antitrust laws.

12 The League concedes that the Sherman Act could be found applicable, depending on the circumstances, if a challenged restraint related to a permissive rather than a mandatory subject of bargaining; if the restraint had been imposed on employees outside the collective bargaining process or had not originally been proposed in good faith; or if the affected employees ceased to be represented by a certified union. None of these circumstances are presented by this case.

13 The dissent places great stress on Professor Lock's article, *The Scope of the Labor Exemption in Professional Sports*, 1989 Duke L.J. 339. Much of Lock's reasoning is based upon the "significant mismatch in relative bargaining positions" and, in addition to the labor exemption,

appeal, we need not decide issues left unresolved by this opinion.

III.

In sum, we hold that the antitrust laws are inapplicable under the circumstances of this case as the nonstatutory labor exemption extends beyond impasse. We reverse the order of the district court and remand the case with instructions to enter judgment in defendants' favor on Counts I, II, and VIII of plaintiffs' amended complaint.

HEANEY, *Senior Circuit Judge*, dissenting.

Today, the majority permits the owners to violate the antitrust laws indefinitely. Because such a result is not justified by the labor laws, I dissent.

After carefully reviewing the record and the briefs, it seems clear to me that we improvidently granted the owners permission to file an interlocutory appeal. The owners conceded at oral argument that the district court has yet to determine whether the parties have reached an impasse on the college draft issue.[1] Because the college draft is an essential element of the package of player restraints, it is difficult to under-

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addresses other issues, such as television revenues and restriction on movement of franchises as well as repeal of existing antitrust exemptions. As a court, we have a limited issue before us as to the temporal extent of the nonstatutory labor exemption. We acknowledge the many policy issues that exist in the League/Players dispute that may be addressed by Congress but not by us. Interestingly, while not in the record before us, Professor Lock states that television revenues now exceed gate revenues which possibly may explain the dissent's reference to the change in percentage of gross revenues that player salaries represent.

1 The following colloquy occurred at oral argument:

THE COURT: And as to the college draft issue, Judge Doty has made a specific finding that there was no impasse; is that correct?

COUNSEL FOR OWNERS: He has not addressed that question yet * * * and that issue is not before the court on this certification.

stand how either the district court or this Court can determine whether an impasse has, in fact, been reached on the important question of player restraints.[2]

Moreover, the interests of justice will be served if we permit the district court to try the case and to reach a decision on the question of whether the player restraints, considered collectively, violate the antitrust laws under the rule of reason.[3] If an appeal then were taken, we would have a complete record. It is also likely that the parties will resolve all contractual disputes during the course of the litigation, a result that should be encouraged. As long as both parties are uncertain about the ultimate result, they are apt to find it in their mutual interest to agree rather that to have a decision imposed on them by the court. There is no reason why the

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2 Had I been the original factfinder, I would not have found impasse. Not only is the college draft issue still open, but it appears that the parties continue to meet on grievances, drug testing, and other matters of importance. *See Henry Miller Spring Co.*, 273 NLRB 472, 472 (1984) (no impasse where parties are still negotiating over significant issues). The NLRB, however, found the question of free agency to be an issue of such overriding importance that no agreement could be reached as long as there was disagreement on that issue. *NFL Players Association*, No. 2-CB-12117 (as amended), Advice Memo. at 7-8 (Apr. 28, 1988). The NLRB thus found impasse. *See Bell Transit Co.*, 271 NLRB 1272, 1273 (1984) (impasse in negotiations exists if impasse exists on issues of *supreme* importance); *E.I. DuPont & Co.*, 268 NLRB 1075, 1076 (1984) (impasse in negotiations if impasse exists on issue of *overriding* importance). Neither party asked for a review of that decision. The district court relied on the NLRB's decision to find impasse.

3 Player restraints agreed to by the owners and the players in the 1982 collective bargaining agreement did not provide an opportunity for players to become free agents. In the five years during which the 1982 agreement was in effect, only one player received an offer from another club. Under the restraint package initiated unilaterally by the owners in February 1989, after the NLRB found that an impasse had occurred in negotiations, each club was permitted to protect 37 players. Thus, none of the top 37 players on each team has had the opportunity to become a free agent and establish his worth in the open market. The remaining 619 players were unprotected and able to enter into the free agency market. Of that number, 229 were signed by other teams. Of the 229, 149 were under contract with an NFL team as of the start of this season. For a discussion of the application of the antitrust laws to professional football and other sports, see *Monopoly Sports Leagues*, 73 Minn.L.Rev. 643 (1989).

case cannot be fully heard and decided by the district court before the 1990-91 NFL football season opens.

Because, and only because, the majority reverses the district court and holds that the nonstatutory labor exemption to the antitrust laws does not expire at impasse, do I state my agreement with the district court that the exemption ends when the parties have reached an impasse in negotiations.[4]

The district court's opinion is well reasoned and fully consistent with this Court's holding in *Mackey v. National Football League*, 543 F.2d 606 (8th Cir.1976). In *Mackey*, we held that only those collective bargaining agreements which are the products of bona fide arm's length bargaining are immune from the application of the antitrust laws. While *Mackey* left open the question of when the labor exemption expires, the clear implication of that case is that the exemption should protect illegal restraints only as long as such restraints are part of bona fide collective bargaining. *Mackey*, 543 F.2d at 614 ("the policy favoring collective bargaining is furthered to the degree necessary to override the antitrust laws *only* where the *agreement* sought to be exempted is the product of bona fide arm's length bargaining") (emphasis added).[5] The logic

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4 I favor the impasse test even though a persuasive argument can be made for ending the exemption at the expiration of the collective bargaining agreement. *See* Lock, *The Scope of the Labor Exemption in Professional Sports*, 1989 Duke L.J. (forthcoming). The author concludes that the expiration of the collective bargaining agreement is the only endpoint that promotes collective bargaining and labor law principles without subverting federal antitrust policy.

The test adopted in *Bridgeman v. NBA*, 675 F.Supp. 960 (D.N.J.1987), that the labor exemption survives only as long as the employer continues to impose the restriction in question unchanged and reasonably believes that the practice or some variant will be incorporated in the next agreement, is impractical, permits the labor laws to trump the antitrust laws without any labor law justification, and is inconsistent with *Mackey* in much the same manner as the majority's test.

5 This view of *Mackey* is also consistent with Supreme Court decisions addressing the scope of the labor exemption. *See, e.g., Connell Constr. Co. v. Plumbers & Steamfitters Local 100*, 421 U.S. 616, 621-22, 95 S.Ct. 1830, 1834-35, 44 L.Ed.2d 418 (1975) ("nonstatutory exemption has its source in strong labor policy favoring the association of employees to eliminate competition over wages and working conditions"); *Amalgamated Meat Cutters*

of *Mackey* as applied to this case is clear. The labor exemption will not immunize restraints which are unilaterally continued after impasse because such restraints are not agreed to during good faith bargaining. Similarly, new restraints, unilaterally implemented, are not protected by the labor exemption. Union approval is a prerequisite to the application or continuation of the exemption.

The majority purports to reject the owners' argument that the labor exemption in this case continues indefinitely. The practical effect of the majority's opinion, however, is just that—because the labor exemption will continue until the bargaining relationship is terminated either by a NLRB decertification proceeding or by abandonment of bargaining rights by the union.

The majority asserts that the players can seek a cease and desist order from the NLRB to prohibit conduct constituting an unfair labor practice. Implicit in this assertion is the idea that it may be an unfair labor practice for employers to insist on a package of player restraints which violate the antitrust laws. The problem is that the NLRB will not decide that question. The NLRB will say that it is for the courts to decide whether the antitrust laws are being violated. We should accept our responsibility and direct the district court to make that determination.[6]

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v. Jewel Tea Co., 381 U.S. 676, 689, 85 S.Ct. 1596, 1601, 14 L.Ed.2d 640 (1965) ("exemption for union-employer agreements is very much a matter of accommodating the coverage of the Sherman Act to the policy of the labor laws").

6 I find no support in *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 59 S.Ct. 206, 83 L.Ed. 126 (1938), for the majority's position. In that case, the United Electrical Workers contended that Consolidated Edison was interfering with the right of Consolidated's employees to form, join, or assist labor organizations of their own choosing and were contributing financial and other support to the International Brotherhood of Electrical Workers. The NLRB found that the company had violated sections 8(a)(1), (2) and (3) of the National Labor Relations Act, 29 U.S.C. §§ 158(a)(1), (2) and (3). It entered an order designed to correct the effects of the unfair labor practices, including an order for the company to cease and desist giving effect to a contract that had been entered into by Consolidated and the International Brotherhood of Electrical Workers. The Supreme Court concluded that the NLRB

The only basis for NLRB action thus would appear to be a petition for decertification. Certainly, the owners will not file such a petition knowing full well that, if they do, they will subject themselves to antitrust scrutiny. Certainly, the Union will not file such a petition when the price will be the loss of collective bargaining rights. The only likely source for a petition to decertify is a group of high-salaried, highly skilled players who believe that they could do better without a union.[7] It follows that the end result of the majority opinion is that once a union agrees to a package of player restraints, it will be bound to that package forever unless the union forfeits its bargaining rights. Certainly, *Mackey* does not suggest such a result.

The majority also suggests that the union can strike to eliminate or modify the player restraints. This is, of course, an alternative, but should players be forced to strike to alter owner conduct which violates the antitrust laws? I think not.[8]

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was without authority to enter the cease and desist order because the NLRB neither alleged nor proved that those persons who jointed the International Brotherhood of Electrical Workers did so because of the unfair labor practices. Thus, it reasoned that a majority of the employees may well have approved the collective bargaining agreement. Try as I may, I am unable to see how that case is relevant to the matter at hand.

7 A judicial determination that challenged restraints are exempt from the antitrust laws by virtue of the union's existence might induce the players to decertify the union. Lock, *The Scope of the Labor Exemption in Professional Sports*, 1989 Duke L.J. (forthcoming).

8 *See* Lock, *The Scope of the Labor Exemption in Professional Sports*, 1989 Duke L.J. (forthcoming). Lock notes that there are several features that distinguish the professional athletes' unions from the great majority of industrial unions. First, professional athletes do not possess homogeneous skills; a wide range of ability and expertise exists among players. Thus, different players have dramatically different needs from a union. Second, the nature of professional sports presumes that the owners retain nearly complete discretion to make necessary personnel changes to produce a winning team. Typically, a professional athlete has virtually no job security. For example, the NFL standard player contract contains no injury protection beyond the season in which the injury occurs and grants the team sole discretion to terminate a player's contract at any time for lack of skill. Only five percent of all NFL players have been able individually to limit this discretion.

Neither scenario, decertification nor economic strife, harmonizes the antitrust laws with the labor laws. *See Mackey*, 543 F.2d at 613-14 ("Although the cases giving rise to the nonstatutory exemption are factually dissimilar from the present case, certain principles can be deduced from those decisions governing the proper accommodation of the competing labor and antitrust interests involved here.") (footnotes omitted).

The majority opinion will, moreover, discourage collective bargaining. Players will be considerably less likely to enter into any agreement with respect to player restraints because of the certainty that the terms of the agreement will become the terms of employment *ad infinitum*, unless they strike and win. *See* National Labor Relations Act § 1, 29 U.S.C. § 151 ("experience has proved that protection by law of the right of employees to organize and bargain collectively . . . promotes the flow of commerce . . . by encouraging practices fundamentally to the friendly adjustment of industrial disputes").

In practical terms the majority has eliminated the owners' fear of the antitrust lever; therefore, little incentive exists for the owners to ameliorate anticompetitive behavior damaging to the players. *See* National Labor Relations Act § 1, 29 U.S.C. § 151 (the NLRA is aimed at promoting "actual liberty of contract" by redressing the unequal balance of bargaining power between employers and employees); Norris-LaGuardia Act § 2, 29 U.S.C. § 102 (the Norris-LaGuardia Act is aimed at redressing the unequal balance of bargaining power between employers and employees); *see also NLRB v. Insurance Agents Int'l Union*, 361 U.S. 477, 506-07, 80 S.Ct. 419, 436, 4 L.Ed.2d 454 (1960) (Frankfurter, J.,

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In addition, the professional life of an athlete is short, resulting in high turnover of union members. The NFL Players Association experiences an average yearly turnover of twenty-five percent. Thus, a strike jeopardizes a significant portion of the career and earning potential of many athletes. Moreover, most professional athletes possess highly specialized skills that are rarely marketable in any other industry. As a result, players are extremely vulnerable to explicit and implicit management pressure.

separate opinion) ("main purpose of the Wagner Act was to put the force of law behind the promotion of unionism as the legitimate and necessary instrument 'to give laborers opportunity to deal on equality with their employer' ") (citation omitted).

To argue that continuing the exemption beyond impasse is conducive to a stable bargaining environment and judicial nonintervention, as the majority has done, is untenable. *See* Lock, *The Scope of the Labor Exemption in Professional Sports*, 1989 Duke L.J. (forthcoming). Rather, the majority's view undercuts the labor law principles of freedom to contract and the promotion of bona fide, arm's length negotiations. Under the majority's rule, an agreement to a particular restraint for a *finite* period of time operates to waive, indefinitely or permanently, a union's right to challenge that restraint after the expiration of the agreement under the antitrust laws. The ultimate result is that the majority has intervened to remove the players' rights under the antitrust laws from the bargaining table and has unjustifiably given the owners a continuing right to circumvent the antitrust laws.[8]

It may be argued that both successful and unsuccessful strikes and lockouts are normal parts of the collective bargaining process and that this Court should not give the players through court action what they are unable to win at the bargaining table or through economic action. I subscribe to that view, but this view cannot be controlling where the

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9 In 1961, Congress passed legislation permitting the NFL to sell its television rights in a package and to allocate the revenues on a pro rata basis, thus authorizing what otherwise would have been a clear violation of the antitrust laws.

In 1966, Congress enacted legislation sanctioning the merger between the NFL and the AFL, a merger which otherwise would have violated the antitrust laws.

Each of these actions by Congress weakened the players and their unions in the collective bargaining process vis-a-vis the owners. In 1966, when the AFL was a bona fide competitor of the NFL, salaries accounted for 67% of gross revenues. In the years following the merger, the percentage decreased. In 1972, the percentage was 42%. In 1980, salaries accounted for 30% of league revenues. Certainly, the courts should not tilt the scales further in favor of the owners by permanently legalizing violations of the antitrust laws.

employers are engaging in practices which may well be illegal. There must be a point at which the validity of the package of player restraints can be tested without the union resorting to a strike or terminating its collective bargaining rights. In my view, impasse is the appropriate point at which to do this.

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 89-5091

Order Denying Petition for Rehearing
and Suggestion for Rehearing En Banc

Filed: January 17, 1990

MARVIN POWELL; BRIAN HOLLOWAY; MICHAEL KENN; MICHAEL DAVIS; JAMES LOFTON; MICHAEL LUCKHURST; DAN MARINO; GEORGE MARTIN; STEVE JORDAN AND THE NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION on behalf of themselves and all class members,

Appellees,

—v.—

NATIONAL FOOTBALL LEAGUE, et al.,

Appellants.

Before:

LAY, *Chief Judge*,
MCMILLIAN, ARNOLD, JOHN R. GIBSON, FAGG,
BOWMAN, WOLLMAN, MAGILL and BEAM, *Circuit Judges.*

The suggestion for rehearing en banc has been considered by the court and is denied by reason of the lack of majority of active judges voting to rehear the case en banc. Chief Judge Lay and Judge McMillian dissent from the denial of the suggestion for rehearing en banc. Judge John R. Gibson and Judge Wollman concur specially in the denial of the suggestion for rehearing en banc.

The petition for rehearing is also denied.

LAY, *Chief Judge*, with whom MCMILLIAN, *Circuit Judge*, joins dissenting.

I dissent from this court's denial of rehearing en banc. This case is undoubtedly one of the more significant cases this court has confronted in several years. A 2-1 panel opinion now serves as an important precedent of newly-declared law in the accommodation of congressional policies favoring both free competition and collective bargaining. In all due respect, two judges of this court have impliedly overruled this court's long-standing, well-recognized precedent in *Mackey v. National Football League*, 543 F.2d 606 (8th Cir. 1976). In doing so, the panel majority concedes its own uncertainty as to when the antitrust exemption ends, and, in addition, needlessly treats the issues as ripe for resolution.[1]

En banc procedures should seldom be invoked. In recent years I have been critical of this court using en banc proce-

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1 I base my views regarding the panel majority's misinterpretation of *Mackey* only upon the majority's apparent but wrongful assumption that impasse between the union and the owners has been reached.

I agree with Judge Heaney that the district court should not have found impasse on the single issue of the free agency rule. *See Powell v. National Football League*, No. 89-5091, slip op. at 21-22 (8th Cir. Nov. 1, 1989) (Heaney, J., dissenting). The parties are still negotiating over other terms of the contract. Impasse on overall negotiations of the contract has not been reached by the parties and therefore summary judgment is not ripe at this time. The parties may yet settle all their disputes in one agreement. The finding of impasse, prematurely acquiesced in by the panel majority, overlooks the fact that in 1976 the owners argued a "quid pro quo" existed for the adoption of the Rozelle Rule in the fact that the players received increased pension rights and the right to negotiate their own contracts. *See Mackey*, 543 F.2d at 616. Such an argument illustrates that labor negotiations involve a give and take on many varied issues. It is impractical to reach sound legal decisions on a bifurcated bargaining subject when other subjects which are inherently intertwined are still pending negotiation.

The panel majority seemingly agrees that no impasse has been reached. *See Powell*, slip op. at 16 n.8. If the panel majority had stopped there, I would have no disagreement. The suit could be dismissed on the ground that bargaining on all subjects, including the free agency rule, continues. But the panel majority goes on and rules, in an unprecedented decision, that the exemption continues beyond a hypothetical impasse. Thus, the panel majority opinion is pure dicta.

dures to hear routine and insignificant issues. *See, e.g., United States v. Arpan*, 887 F.2d 873, 879 n.2 (8th Cir. 1989) (en banc) (Lay, C.J., dissenting) (issue of trial judge's response to juror question). En banc procedures expend valuable judicial energies which should be used not to correct questionable panel decisions but only to decide decisions of the utmost importance or to resolve intra-circuit conflicts. *See Western Pac, R.R. Corp. v. Western Pac, R.R.*, 345 U.S. 247, 260-62 (1953). Here, not only is the issue significant, but the panel had impliedly overruled a long-standing decision of this court. Thus, in my judgment, this case is among the rare exceptions which should be reheard en banc.

This court's *Mackey* decision, which I authored in 1976 and which then Chief Judge Floyd Gibson and Judge William Webster joined, declared "the policy favoring collective bargaining is furthered *to the degree necessary* to override the antitrust laws *only* where the agreement sought to be exempted is the product of bona fide arm's length bargaining." *Id.* at 614 (emphasis added). *Mackey* is founded on the principles that an employer's exemption owes its existence to union consent, and is aimed at preserving the integrity of the negotiating process. As stated by the Third Circuit in *Scooper Dooper, Inc. v. Kraftco Corp.*, 494 F.2d 840, 847 n. 14 (3d Cir. 1974):

> We reject Scooper Dooper's contention that the labor exemption is unavailable to employers. Such a proposition would undermine the vitality of the exemption by discouraging bargaining on the part of management. To preserve the integrity of the negotiating process, employers who bargain in good faith must be entitled to claim the antitrust exemption. (citation omitted)

The panel majority purports to apply *Mackey*, yet ignores these principles. The undeniable reality is that the panel opinion does not apply *Mackey*, it rejects it by destroying its carefully constructed limitations.

The panel majority notes that *Mackey* left open the question whether the exemption continues after a bona fide agree-

ment formally terminates.[2] However, the panel then proceeds to extend the law based on a premise which completely ignores the rationale of *Mackey*. In the present case the collective bargaining agreement containing the exempted restraint has not only come to an end, but, under the panel majority's erroneous assumption, the parties have unsuccessfully bargained over its continuance to the point of impasse. Clearly, at this point the restraint can no longer be considered "the product of bona fide arm's-length negotiation." Once impasse has been reached, after termination of an agreement, it is a complete nonsequitur to hold that continued restraints are protected as an accommodation of the good faith bargaining of the parties.

The panel decision destroys the very foundation of the limits we carefully constructed in *Mackey*. The panel majority reasons that, notwithstanding impasse, as long as the restraint was at *one time* contained within a terminated agreement it retains immunity as the "product" of collective bargaining. Surely this cannot be the law. If the exemption does not end at impasse, when does it end? The majority's view does not accommodate labor policy, it instead offers an employer's Shangri-La of everlasting immunity from the antitrust laws.

The holding in *Mackey* was focused on "the proper accommodation of the competing labor and antitrust interests * * *." 543 F.2d at 614. We based our analysis on the Supreme Court's requirement that "a proper accommodation between the congressional policy favoring collective bargain-

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2 In *Mackey*, we did not need to decide whether the effect of an agreement might extend beyond its formal expiration date for purposes of the labor exemption. *Mackey*, 543 F.2d at 616 n.18. We expressly acknowledged the issue, however, in recognition of conflicting statutory obligations that might arise given cases requiring an employer to adhere to contract terms after the contract's formal expiration date while the parties continue their bargaining for a new contract. *See, e.g., Hinson v. NLRB*, 428 F.2d 133, 139 (8th Cir. 1970). This duty to maintain the status quo, however, ends at the point impasse is reached. At that point, the slate is essentially wiped clean, and the employer is free to unilaterally implement proposals which the union may have strongly opposed at the bargaining table.

ing under the NLRA and the congressional policy favoring free competition in business markets requires that some union-employer *agreements* be accorded a *limited* nonstatutory exemption from antitrust sanctions." *Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 622 (1975) (emphasis added). *Mackey* did not rely solely on the existence of an agreement. Rather it turned on whether the restraints were obtained through the bona fide collective bargaining process. We held that the exemption was not available, *notwithstanding* the Rozelle Rule's incorporation into earlier agreements,[3] because the club owners had refused to bargain in good faith over the Rozelle Rule. *Mackey*, 543 F.2d at 613, 616. Here there can be no question but that once the contract ended and an impasse in attempting to negotiate further restraints on player's services was reached, the exemption no longer was effective because the bona fide bargaining process had ceased. Assuming impasse, both sides are free to act unilaterally.[4] At this point, the restraint is no longer a product of collective bargaining; it is simply a unilateral rule imposed by management. To hold otherwise undermines basic, rudimentary labor policy and law.

The rationale underlying the panel decision appears to be that a union should not be entitled to invoke the antitrust laws to gain something it could not win at the bargaining table. This overlooks the fact that the restraint involved is clearly beneficial to management, and is illegal unless otherwise exempt. The panel majority fails to comprehend that it was not the union that failed to win a concession, but *the employer* who gained victory in the first instance by obtaining the antitrust exemption *through union consent*.

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3 The earlier agreements in *Mackey* containing the restraints even contained a "zipper" clause which read: "[T]his Agreement represents a complete and final understanding on all bargainable subjects of negotiation among the parties during the term of this Agreement * * *." 543 F.2d at 613.

4 This is true of course as long as the unilateral action adheres to recognized legal restraints governing the parties' conduct. One such legal restraint would certainly be the antitrust laws.

The only labor policy of which I am aware that is accommodated by exempting the laws protective of free competition is bona fide collective bargaining. Yet, this court's unprecedented decision leads to the ineluctable result of union decertification in order to invoke rights to which the players are clearly entitled under the antitrust laws. *See Powell*, slip op. at 25 (Heaney, J., dissenting). The plain and simple truth of the matter is that the union should not be compelled, short of self-destruction, to accept illegal restraints it deems undesirable. Union decertification is hardly a worthy goal to pursue in balancing labor policy with the antitrust laws.

The panel decision, left undisturbed by the failure of the en banc court to rehear the case today, not only fails to adhere to our precedent in *Mackey*, but substantially amends the antitrust laws. In doing so, it ignores the Supreme Court's admonition that "exemptions from antitrust laws are to be narrowly construed." *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 231 (1979). For these reasons, I would grant petitioner's suggestion for rehearing en banc, and would vote to overturn the panel opinion.

JOHN R. GIBSON, *Circuit Judge*, concurring in the denial of the rehearing en banc, joined by WOLLMAN, *Circuit Judge*.

As the authoring judge of the court's opinion this case, I feel compelled to make a brief response to the dissent to denial of rehearing en banc. The dissent to denial argues that there is in fact no impasse and that the panel opinion is dicta. The issue is not so simple as the dissent to denial would make it. The district court in the decision on appeal, ruled that the termination of the labor exemption expired when the parties reach impasse "as to that issue," and in a later order held that there had been impasse as to the free agency issue. Neither of the parties have challenged the district court's holding that there was impasse. That issue was not before the court for decision. Insofar as this decision contained factual elements, there was no claim made that it was clearly erroneous. The dissent to the panel opinion

makes no such suggestion, but only observes that the dissenting judge would not have found impasse had he been the original fact-finder. The footnote to the panel dissent then expands upon the issue demonstrating that there is a division between NLRB decisions as to the divisibility or indivisibility of impasse. These legal issues were likewise not the subject of briefing or argument before the court. Accordingly, the district court holding that there was impasse as to the specific issue was part of the factual and procedural pattern presented to this court framing the issue to decide. It would have been improper to have decided flatly that there was no impasse, but the dissent to denial would take this quantum leap and place the case in a different posture.

Little is to be gained by further response to the dissent to denial. Seven judges of the court have declined to rehear, and the case should simply be left at that point.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

Appendix C

UNITED STATES DISTRICT COURT
D. MINNESOTA

FOURTH DIVISION

Civ. No. 4-87-917

Jan. 29, 1988

MARVIN POWELL, BRIAN HOLLOWAY, MICHAEL KENN, MICHAEL DAVIS, JAMES LOFTON, MICHAEL LUCKHURST, DAN MARINO, GEORGE MARTIN, STEVE JORDAN and the NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION on behalf of themselves and all class members,

Plaintiffs,

—v.—

NATIONAL FOOTBALL LEAGUE, et al.,

Defendants.

Edward M. Glennon, Carol T. Rieger, J. Michael Dady, Luke H. Terhaar and Lindquist & Vennum, Minneapolis, Minn., *for plaintiffs*.

Laura Besvinick, Bruce W. Greer and Greer, Homer, Cope & Bonner, Miami, Fla., *for plaintiff-intervenor*.

Paul J. Tagliabue, John H. Schafer, Herbert Dym, Lyle Jeffrey Pash and Convington & Burling, Washington, D.C., *for defendants*.

MEMORANDUM AND OPINION

DOTY, *District Judge.*

Plaintiffs in this action are the National Football League Players Association ("NFLPA") and several professional football players who play for various clubs in the National Football League ("NFL"). On October 15, 1987, plaintiffs commenced this lawsuit against the NFL and its member organizations pursuant to sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 and 26, to enjoin and otherwise redress alleged violations of the Sherman Antitrust Act, 15 U.S.C. § 1 *et seq.*

The case is now before the Court on plaintiffs' motions for partial summary judgment and for a preliminary injunction, and on defendants' cross-motion for summary judgment. Specifically, plaintiffs request partial summary judgment declaring that the NFL defendants have wilfully acquired or maintained monopoly power in the market for major league professional football in the United States. Plaintiffs also seek to enjoin defendants from implementing or continuing a system of alleged player restraints known as the Right of First Refusal/Compensation system and the NFL Players Contract (referred to collectively as the "player restraints").[1] Defendants' cross-motion seeks summary judgment declaring that the challenged restraints are insulated from antitrust scrutiny by operation of the nonstatutory labor exemption to the antitrust laws.

FACTUAL BACKGROUND

The restraints which are the subject of this motion are the Right of First Refusal/Compensation system and the NFL Player Contract. Plaintiffs allege that since the League's inception, defendants have continuously imposed these and

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1 Plaintiffs also contend that the NFL College Draft violates the antitrust laws, but only the Right of First Refusal/Compensation system and the NFL Player Contract are the subjects of this motion.

other anti-competitive player restraints in order to depress player salaries and restrict player movement among the NFL clubs.

NFL Player Contract[2]

Since at least the early 1950's, defendants have required all NFL players to sign a standardized contract, essentially uniform in all respects except for compensation and duration, as a condition to becoming or remaining employed in the NFL. The standard form utilized by the NFL defendants from the early 1950's through approximately 1976 was known as the "Standard Player Contract." The NFL defendants changed the standard form contract in 1976 and implemented a form contract known as the "NFL Player Contract," which has remained unchanged from 1977 to date. Plaintiffs allege that the NFL Player Contract contains many restrictive provisions including, among other things, a requirement that the player abide by various rules and regulations unilaterally adopted by the NFL. These rules and regulations include the so-called "waiver system" through which players allegedly are denied free agency in the event of their discharge by the club for which they are playing unless and until all 28 NFL clubs sequentially "waive" their self-conferred rights to employ the player under the terms of the player's existing contract. The player must accept the terms of the standardized contract or he may not play football. Plaintiffs contend that the NFL Player Contract violates the antitrust laws.

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2 Professional team sports athletes in the United States are generally represented by labor organizations, such as the NFLPA, which enter into collective bargaining agreements with league management to set and establish league-wide benefits such as pensions, severance payments, minimum salaries and grievance procedures. Players in all of the major professional team sports leagues, however, also play for their particular clubs pursuant to individual player contracts. Thus, each player in the NFL individually negotiates his salary and contract duration with the particular NFL club that employs him, subject to the broader conditions established in the collective bargaining agreement.

Right of First Refusal/Compensation System

Under the Right of First Refusal/Compensation system, every NFL club retains rights to "its players" even though, in the case of veteran free agents, contractual rights to a player no longer exist. When a veteran player's contract has expired and a competing NFL club makes an offer to that player, the player's old team may keep the player simply by matching the competing offer; the player's old club therefore is said to have a "right of first refusal" as to the player's services. If the competing offer is large enough, and the club to which the player was previously under contract does not choose to match a competing offer, the old club will receive draft choice "compensation" which may be extremely costly to the acquiring club. Plaintiffs allege that in addition to restraining player movement, this system has effectively eliminated competition among NFL clubs for player services.

The current Right of First Refusal/Compensation system, though substantially modified, finds its source in the old "Rozelle Rule."[3] The Rozelle Rule was imposed upon the players by the NFL defendants from 1963 until 1976 when the Eighth Circuit held that the rule as implemented contravened the antitrust Rule of Reason and thus constituted an unreasonable restraint of trade in violation of Section 1 of the Sherman Act. *Mackey v. National Football League*, 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801, 98

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3 The written expression of the Rozelle Rule, contained in Article XII, Section 12, par. H of the Constitution and By-Laws of the National Football League, provided:

> Any player, whose contract with the League Club has expired, shall thereupon become a free agent and shall no longer be considered a member of the team of that club following the expiration date of such contract. Whenever a player, becoming a free agent in such manner, thereafter signs a contract with a different club in the league, then, unless mutually satisfactory arrangements have been concluded between the two league clubs, the Commissioner may name and then award to the former club one or more players, from the Active Reserve, or Selection List (including future selection choices) of the acquiring club as the Commissioner in his sole discretion deems fair and equitable; any such decision by the Commissioner shall be final and conclusive.

S.Ct. 28, 54 L.Ed.2d 59 (1977). In holding that the Rozelle Rule violated the antitrust laws under a Rule of Reason analysis,[4] the Eighth Circuit stated:

> In defining the restraint on competition for players' services, the district court found that the Rozelle Rule significantly deterred clubs from negotiating with and signing free agents; that it acts as a substantial deterrent to players playing out their options and becoming free agents; that it significantly decreases players' bargaining power in contract negotiations; that players are thus denied the right to sell their services in a free and open market; that as a result, the salaries paid by each club are lower than if competitive bidding were allowed to prevail; and that absent the Rozelle Rule, there would be increased movement in interstate commerce of players from one club to another. We find substantial evidence in the record to support these findings.

543 F.2d at 620.

From March 1, 1977 through July 15, 1982, a revised system of free agency existed in the NFL. The new Right of First Refusal/Compensation system was developed jointly by the NFLPA and the NFL Management Council in negotiations in 1976-1977 that led to the 1977 Collective Bargaining Agreement. The 1977 agreement was incorporated in a class action settlement, approved by the district court, that brought to an end five years of labor-management strife in the NFL. *See Alexander v. National Football League*, 1977-2 Trade Cas. (CCH) par. 61,730 (D.Minn.1977), [Available on WESTLAW, 1977 WL 1497], *aff'd sub nom., Reynolds v. National Football League*, 584 F.2d 280 (8th Cir.1978). In approving the settlement, the district court found that the

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4 Initially, the Court found that because the Rozelle Rule was not the subject of arm's-length collective bargaining but rather was unilaterally imposed upon plaintiffs, the player restraints were not immune from antitrust scrutiny by virtue of the nonstatutory "labor exemption" to the antitrust laws. Having determined that the player restraints at issue were not exempt from the antitrust laws, the Court proceeded to find that the Rozelle Rule constituted a violation of the antitrust laws under a Rule of Reason analysis.

1977 bargaining agreement fundamentally modified traditional NFL player practices, eliminating "many of the problems which caused players to desire movement from one team to another." *Alexander*, 1977-2 Trade Cas. at par. 72,997, Findings par. 3.27. The district court further noted that the "revised compensation rule has been the subject of serious arm's-length collective bargaining between the NFLPA and the NFL Management Council." *Id.* at par. 73,000, Findings par. 3.52. In affirming the decision of the district court, the Eighth Circuit stated that it was a "near certainty" that the Agreement was the product of good faith collective bargaining and would be found exempt if that issue were presented to the Court. *Reynolds v. National Football League*, 584 F.2d at 288.

Notwithstanding the significant liberalization of the traditional free agency system, during the 5-year period covered by the 1977 Collective Bargaining Agreement, fewer than 50 out of 600 players received offers from other NFL clubs after becoming free agents. Plaintiffs allege that the only time players moved was when, in effect, a trade was arranged between two NFL clubs. That practice occurred on fewer than 20 occasions and only one player actually moved from one NFL club to another in a transaction in which draft choice compensation was payable.

The Right of First Refusal/Compensation system was again implemented in the 1982 Collective Bargaining Agreement. The 1982 Agreement, executed on December 11, 1982, by the NFLPA and the NFL Management Council, came at the conclusion of a 57-day strike by the NFL players. The total package of employee benefits won by the union was substantial, with financial commitments by the NFL clubs exceeding $1.2 billion over the five seasons covered by the Agreement. The 1982 Agreement also modified the Right of First Refusal/Compensation system. Most significantly, the 1982 Agreement increased the salary level at which draft choice compensation would be triggered. For example, the salary level at which a third-round draft choice would have to be paid for a veteran free agent entering his fourth NFL season increased from $55,000 in 1981 to $90,000 in 1983.

The 1982 Collective Bargaining Agreement expired on August 31, 1987.[5] The modifications incorporated in the Agreement did not increase player movement in the NFL and, in fact, during the 5-year period covered by the Agreement, not a single veteran player moved from one NFL club to another under the Right of First Refusal/Compensation system.[6] Negotiations both during and after expiration of the Agreement failed to produce an accord regarding the free agency system, and on September 22, 1987, the members of the NFLPA went on strike. Twenty-four days later, on October 15, 1987, the NFLPA ended the strike after the parties once again failed to reach a compromise on the free agency issue.

On February 1, 1988 the contracts of at lest 450 veteran players will expire. For many of the players, this will be their last opportunity to negotiate a contract. Apparently, for a variety of reasons, many of the players would like to move to different teams or geographic locations. Because the existing system of free agency has not enabled players to move freely among the NFL clubs, plaintiffs commenced this action to enable the players to negotiate their new contracts in an environment of unrestricted free agency.[7]

DISCUSSION

On October 15, 1987—the last day of the player strike—plaintiffs filed suit against the NFL defendants alleging that

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5 Plaintiffs contend that the 1982 Collective Bargaining Agreement expired on September 15, 1987. The date of expiration of the Agreement has little effect upon the Court's analysis, and the Court shall assume that the Agreement expired on August 31, 1987.

6 Of the 1,415 players who became veteran free agents during the term of the 1982 Agreement (252 in 1983, 216 in 1984, 269 in 1985, 321 in 1986 and 357 in 1987), apparently only one player even received an offer from another club.

7 Defendants contend that the players' insistence upon obtaining free agency is, in fact, little more than an attempt to increase player salaries by inducing bidding among the NFL clubs.

continued imposition of the free agency system violates the antitrust laws. Plaintiffs are now before the Court requesting injunctive relief prohibiting defendants from continuing to impose the system of player restraints discussed above.[8] Defendants' cross-motion asks this Court to declare that the dispute relating to the system of player restraints may be resolved only within the context of the national labor laws, and that the nonstatutory "labor exemption" insulates the challenged restraints from antitrust scrutiny.

Because a finding that the player restraints are "exempt" from antitrust scrutiny would obviate the need to address plaintiffs' motions, the Court shall first address the "labor exemption" issue.[9]

Applicability of the Antitrust Laws

The 1982 Collective Bargaining Agreement containing the system of player restraints at issue expired on August 31, 1987. Plaintiffs contend that because that agreement has expired, no labor exemption from the antitrust laws shields the player restraints from antitrust scrutiny. Thus, the only issues presented by defendants' cross-motion are whether the nonstatutory labor exemption to the antitrust laws continues to protect the allegedly unlawful[10] system of player restraints

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8 Plaintiffs have also moved the Court for summary judgment declaring that defendants have wilfully acquired or maintained monopoly power in the market for major league professional football.

9 The Court begins its analysis with the sense that plaintiffs are seeking to gain through the courts what they could not win at the bargaining table. Nevertheless, in the absence of an exemption, if the practices engaged in by defendants violate substantive law, plaintiffs are entitled to redress.

10 For the limited purpose of deciding this motion, the Court shall assume that the challenged system of player restraints is unlawful. The assumption is made solely for the sale of analytical convenience, and in no way reflects upon the merits of plaintiffs' allegations.

following expiration of the collective bargaining agreement,[11] and if so, for how long.

Two types of labor exemptions—statutory and nonstatutory—insulate certain inherently anti-competitive union and union-employer activity from antitrust liability. The statutory labor exemption removes from the coverage of the antitrust laws certain legitimate, albeit anti-competitive, union activities because they are favored by federal labor policy.[12] The nonstatutory labor exemption, on the other hand, exempts certain anti-competitive union-employer activities from antitrust sanctions. The Supreme Court has recognized that in order to properly accomodate the congressional policy favoring free competition in business markets with the congressional policy favoring collective bargaining under the National Labor Relations Act, 29 U.S.C. § 151 *et seq.*, certain union-employer agreements must be accorded a limited

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11 The *Mackey* court did not reach this issue. There, the Eighth Circuit held that the labor exemption did not protect the Rozelle Rule from antitrust scrutiny because the Rule was not the product of arm's-length bargaining, but rather had been unilaterally imposed upon the players by the NFL clubs. Accordingly, the Court noted, "we need not decide whether the effect of an agreement extends beyond its formal expiration date for purposes of the labor exemption." 543 F.2d at 616 n. 18.

12 In *Bridgeman v. National Basketball Association*, 675 F.Supp. 960 (D.N.J.1987), the Court summarized the scope of the statutory labor exemption:

> The concept of a labor exemption finds its source in sections 6 and 20 of the Clayton Act, 15 U.S.C. Section 17 and 29, U.S.C. section 52, and the Norris-LaGuardia Act, 29 U.S.C. sections 104, 105 and 113. Those provisions declare that labor unions are not combinations or conspiracies in restraint of trade, and specifically exempt certain union activities such as secondary picketing and group boycotts from the coverage of the antitrust laws. This statutory exemption insulates inherently anticompetitive collective activities by employees because they are favored by federal labor policy.
>
> The statutory exemption extends to legitimate labor activities unilaterally undertaken by a union in futherance of its own interests. It does not extend to concerted action or agreements between unions and nonlabor groups. This is where the nonstatutory exemption comes into play.

Bridgeman, At 963-64 (citations omitted).

nonstatutory exemption from antitrust sanctions. *See Connell Construction Co., Inc. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 621-622, 95 S.Ct. 1830, 1834-1835, 44 L.Ed.2d 418 (1975); *Amalgamated Meatcutters v. Jewel Tea Co., Inc.*, 381 U.S. 676, 698, 85 S.Ct. 1596, 1601-02, 14 L.Ed.2d 640 (1965).

Generally, whether the nonstatutory exemption will protect a particular agreement turns upon whether the relevant federal labor policy is deserving of pre-eminence over federal antitrust policy under the circumstances of the particular case. *Mackey*, 543 F.2d at 613; *see also, Amalgamated Meatcutters v. Wetterau Foods*, 597 F.2d 133, 136 (8th Cir.1979). Defendants insist that, on the facts of this particular case, federal labor policy compels exemption of the player restraints from antitrust scrutiny.

Defendants advance two theories in support of their contention that the player restraints are exempt from review under the antitrust laws even though the collective bargaining agreement embodying those restraints has expired. Under the first theory, defendants assert that the challenged restraints are entitled to absolute immunity because they are subjects of mandatory bargaining affecting only parties to the employment relationship. Alternatively, defendants argue that the labor law "survival" doctrine provides the challenged restraints continued protection from the antitrust laws for an indefinite period following expiration of the collective bargaining agreement.

Absolute Immunity Theory

Defendants insist that "conduct in the context of collective bargaining relating to mandatory subjects of bargaining, and affecting only parties to the employment relationship, is not subject to the antitrust laws, whether or not there is a current or expired collective bargaining agreement." Essentially, defendants are asking this Court to declare that, as a matter of law, federal labor policy completely overrides antitrust interests in the context of mandatory collective bargaining

where the anticompetitive effects are limited to the union-employer relationship.

In support of their contention, defendants draw heavily upon established labor law principles dictating non-interference in the bargaining process, and upon Justice Goldberg's concurring and dissenting opinions in the *Jewel Tea* and *Pennington* cases. In those cases, Justice Goldberg declared that "in order to effectuate congressional intent, collective bargaining activity concerning mandatory subjects of bargaining under the [National Labor Relations Act] is not subject to the antitrust laws." *United Mine Workers of America v. Pennington*, 381 U.S. 657, 710, 85 S.Ct. 1585, 1614, 14 L.Ed.2d 626 (1965); *Jewel Tea*, 381 U.S. at 710, 85 S.Ct. at 1614-15 (1965). The Eighth Circuit has noted, however, that Justice Goldberg's test "has never been adopted by a majority of the Supreme Court. Rather, a majority of the Court seems to favor an accomodation less heavily weighted in favor of labor policy." *Mackey*, 543 F.2d at 615 n. 14.

The nonstatutory labor exemption has never been applied to shield league-imposed player restraints merely because such restraints are subjects of mandatory collective bargaining. Indeed, the courts have not hesitated to apply the Sherman Act to club owner-imposed restraints on competition for players' services. *See McCourt v. California Sports, Inc.*, 600 F.2d 1193 (6th Cir.1979); *Mackey*, 543 F.2d 606; *Robertson v. National Basketball Ass'n.*, 389 F.Supp. 867 (S.D.N.Y.1975); *Kapp v. National Football League*, 390 F.Supp. 73 (N.D.Cal.1974); *Boston Professional Hockey Association, Inc. v. Cheevers*, 348 F.Supp. 261 (D. Mass. 1972), *remanded on other grounds*, 472 F.2d 127 (1st Cir. 1972).

Granting a labor practice complete insulation from antitrust scrutiny merely because the activity concerns a subject of mandatory bargaining does not strike the proper accommodation between labor and antitrust laws. "Mandatory subjects of collective bargaining do not carry talismanic immunity from the antitrust laws." *Robertson*, 389 F.Supp. at 888. Congressional policy does not contemplate that the labor laws will automatically override antitrust interests.

Accordingly, in the absence of a specific directive from a higher court, this Court will not extend indefinite, blanket protection to union-employer agreements merely because the challenged activity arises within the context of mandatory collective bargaining.

Survival Doctrine Theory

Under this second theory, defendants assert that the federal labor "survival doctrine" maintains the labor exemption in effect following expiration of the collective bargaining agreement. In order for the exemption to "survive" expiration of the agreement, however, the conduct at issue must have been protected during the existence of the agreement.

In *Mackey*, *supra*, the Eighth Circuit held that the proper accommodation of labor and antitrust interests requires that in order to qualify for the labor exemption to the antitrust laws, union-employer agreements must meet three requirements:

> First, the labor policy favoring collective bargaining may potentially be given preeminence over the antitrust laws where the restraint on trade primarily affects only the parties to the collective bargaining relationship. Second, federal labor policy is implicated sufficiently to prevail only where the agreement sought to be exempted concerns a mandatory subject of collective bargaining. Finally, the policy favoring collective bargaining is furthered to the degree necessary to override the antitrust laws only where the agreement sought to be exempted is the product of bona fide arm's-length bargaining. 543 F.2d at 614 (citations omitted).

Applying these principles to the facts presented here, it is cleat that the player restraints contained in the 1982 Collective Bargaining Agreement were protected by the labor exemption during the life of the Agreement: the alleged restraint on trade affected only the parties to the agreements sought to be exempted;[13] the player restraints constituted a

13 *See Mackey*, 543 F.2d at 615.

mandatory bargaining subject within the meaning of the National Labor Relations Act;[14] and the player restraints sought to be exempted were, in all probability, the product of bona fide arm's-length bargaining.

Plaintiffs apparently concede that the relevant provisions in the 1982 Collective Bargaining Agreement fulfill the first two elements of the *Mackey* test. Plaintiffs do not agree, however, that the player restraints at issue were the product of bona fide arm's-length bargaining, and they contend that summary judgment on this issue therefore is inappropriate. However, sufficient indicia of bona fide arm's-length bargaining exists to warrant entry of summary judgment on this issue in favor of defendants. Significant among the evidence before the Court is the following: the player restraints complained of are specifically contained in the 1982 Collective Bargaining Agreement signed by both the NFLPA and the NFL Management Council; the Preamble to the Agreement recites that the provisions therein are "the product of bona fide, arm's-length collective bargaining;" the Agreement contains a "no-suit" provision; plaintiffs did not challenge the legality of the player restraints or the "no-suit" provision during the existence of the Agreement; and the total package of employee benefits obtained by the NFLPA exceeded $1.2 billion, at least some of which, presumably, was relinquished in consideration for the system of player restraints contained in the Agreement.

Rule 56 of the Federal Rules of Civil Procedure provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the

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14 Under the National Labor Relations Act, "rates of pay, wages, hours of employment, or other conditions of employment" constitute the "mandatory subjects of collective bargaining." *See* 29 U.S.C. §§ 158(a)(5), 158(d), 159(a)(1982). Insofar as the challenged restraints depress player salaries and restrict a player's ability to move from one team to another, the restraints relate to "wages, hours and other terms or conditions of employment." Thus, the player restraints constitute a mandatory bargaining subject within the meaning of the NLRA. *See Mackey*, 543 F.2d at 615.

moving party is entitled to a judgment as a matter of law." In order to withstand summary judgment, the nonmoving party must produce enough evidence so that a reasonable jury could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). The Court finds that, on evidence before the Court, a reasonable jury could not conclude that the player restraints contained in the 1982 collective bargaining agreement were not the product of bona fide arm's-length negotiations. Accordingly, summary judgment on this issue shall be entered in favor of defendants.

Having found that the labor exemption insulated the player restraints during the existence of the 1982 Collective Bargaining Agreement, the Court now turns to the question whether the labor exemption "survives" expiration of the Agreement.

Basic principles of labor law dictate that provisions relating to mandatory subjects of bargaining "survive" formal expiration of the collective bargaining agreement. Typically, the parties to an expired agreement have an obligation to maintain the status quo as to these provisions until a new agreement is concluded or until the parties reach "impasse."[15] The governing principle is that until impasse is reached, an employer is not free unilaterally to change the essential provisions of an expired collective bargaining agreement but must keep those provisions in effect and bargain with the union as to their possible modification. As stated by the Court in *Hinson v. NLRB*, 428 F.2d 133 (8th Cir.1970):

> The spirit of the National Labor Relations Act and the more persuasive authorities stand for the proposition that, even after expiration of a collective bargaining contract, an employer is under obligation to bargain with the Union before he may permissibly make any unilateral change *in those terms and conditions of employment comprising mandatory bargaining subjects within*

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15 Generally, impasse occurs "after good-faith negotiations have exhausted the prospects of concluding an agreement." *Taft Broadcasting Co.*, 163 NLRB Dec. (CCH) 475, 64 L.R.R.M. (BNA) 1386 (1967).

> *the meaning of § 8(d) of the Act.* 428 F.2d at 137-38 (emphasis original).

The Eighth Circuit therefore held that existing terms and conditions continued by operation of law:

> The parties *had* agreed to a subsisting collective bargaining agreement which included the health, welfare, and retirement benefit provisions. The order [of the NLRB] does not compel petitioner to agree to any new or different contract provision; it simply requires him to abide by an obligation once extant by reason of the binding contract but then continuing on after its expiration, in limited form, *not by reason of the contract itself but because of the dictates of the policy embodied in the National Labor Relations Act.*

Id. at 138 (emphasis original). *See also Richardson v. Communications Workers of America*, 443 F.2d 974, 979 (8th Cir. 1971) ("the employee, the union and the company are placed on notice that even after the bargaining agreement terminates the rights and obligations of the parties continue under the umbrage of the National Labor Relations Act"); *accord Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 85 S.Ct. 398, 13 L.Ed.2d 233 (1964); *NLRB v. Cone Mills Corp.*, 373 F.2d 595, 598 (4th Cir.1967) (provisions in collective bargaining agreement "survive" its termination in that union must be given opportunity to bargain before employer can make changes).[16]

The reason for this emphasis on maintaining the status quo is to provide the parties with a stable environment in which to negotiate a new collective bargaining agreement. "Freezing the status quo ante after a collective agreement has expired

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16 The obligation to bargain before changing the status quo exists whether or not the changes favor employees or employer. *NLRB v. Katz*, 369 U.S. 736, 742-43, 82 S.Ct. 1107, 1111, 8 L.Ed.2d 230 (1962). In addition, the obligation to maintain the status quo applies not only to wages but to various other terms and conditions of employment. *See e.g., NLRB v. Southwest Security Equipment Corp.*, 736 F.2d 1332, 1337 (9th Cir.1984), *cert. denied*, 470 U.S. 1087, 105 S.Ct. 1854, 85 L.Ed.2d 151 (1985) (hiring hall provisions survive expiration).

promotes industrial peace by fostering a noncoercive atmosphere that is conducive to serious negotiations on a new contract." *Laborers Health and Welfare Trust Fund v. Advanced Lightweight Concrete Co. Inc.*, 779 F.2d 497, 500 (9th Cir.1985), *cert. granted*, ____ U.S. ____., 107 S.Ct. 1283, 94 L.Ed.2d 142 (1987).

In order to properly accommodate the antitrust policy promoting free competition with the labor law obligation requiring the parties to maintain the status quo following expiration of a collective bargaining agreement, the Court holds that the nonstatutory labor exemption must also "survive" expiration of the Agreement. A New Jersey district court recently reached the same conclusion on nearly identical facts. In *Bridgeman v. National Basketball Association*, 675 F.Supp. 960 (D.N.J.1987), a group of professional basketball players sued the National Basketball Association, alleging that various player restraints imposed by the NBA violated the antitrust laws. After balancing the competing interests of the antitrust and labor laws, the Court concluded that there was

> no merit in the players' contention that restrictions included in a collective bargaining agreement should lose their antitrust immunity the moment the agreement expires. . . . [S]uch a rule is unrealistic in light of the requirement that employers must bargain fully and in good faith before altering a term or condition of employment subject to mandatory bargaining agreement even after the collective bargaining agreement expires. . . . This obligation to maintain the status quo until impasse means that, in a practical sense, terms and conditions of employment that are subjects of mandatory bargaining survive expiration of the collective bargaining agreement.

Bridgeman, at 965 (citations omitted).

Commentators addressing this issue have also advocated application of the "survival" doctrine to labor exemptions:

> The employer's obligation to bargain before acting unilaterally means that, in a practical sense, those terms and conditions of employment that are subjects of mandatory bargaining "survive" expiration. Player restraints, as mandatory bargaining subjects, thus remain in effect after the formal expiration date of collective agreements. In view of this "survival" principal [sic], it follows that the labor exemption should remain available to immunize previously bargained-for player restraints as long as good faith bargaining continues after the collective agreement expires. . . .

Note, *Applicability of the Labor Exemption After the Expiration of Collective Bargaining Agreements in Professional Sports*, 57 N.Y.U.L.Rev. 164, 195-97 (1982); *see also* Berry & Gould, *A Long Deep Drive to Collective Bargaining: Of Players, Owners, Brawls, and Strikes*, 31 Case W.Res. 685, 774 (1981) ("a rule withdrawing [antitrust] immunity because the previous contract expired before a new agreement is reached is contrary to national labor law").

Having determined that the labor exemption "survives" expiration of the collective bargaining agreement, the Court must now determine the period of time for which the exemption remains in effect.

Plaintiffs concede that the labor exemption does not die automatically upon expiration of the collective bargaining agreement. Plaintiffs contend, however, that immunity from antitrust liability lasts only until the employees no longer consent to imposition of the formerly exempted conditions. Specifically, plaintiffs argue that following expiration of a collective bargaining agreement, labor-exempt anticompetitive practices are protected only until the employees have made it "unequivocally clear" that they will no longer assent to continued imposition of the terms or practices.[17]

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17 Without stating the exact point in time at which the players made it "unequivocally clear" that they no longer consented to the challenged restraints, plaintiffs insist that that point has long since passed. Plaintiffs contend that they have manifested their disaffection in a variety of ways since approximately April of 1987. Plaintiffs claim that by various represen-

For a number of reasons, the Court will not accept the endpoint proposed by plaintiffs. First, the Court rejects plaintiffs' proposal because application of their standard could subject an employer to "instant" antitrust liability, including treble damages. Although plaintiffs do not contend that the labor exemption expires "automatically" upon termination of the collective bargaining agreement, it is clear that under plaintiffs' standard, antitrust liability may be imposed contemporaneously with the expiration of an agreement. In the instant case for example, plaintiffs claim that they have insisted for more than a year that they will no longer assent to imposition of the current system of player restraints. It is possible that at some point prior to expiration of the Collective Bargaining Agreement, plaintiffs' manifestations made it "unequivocally clear" that plaintiffs no longer consented to the challenged restraints. Thus, under plaintiffs' proposed standard, defendants could have been subjected to antitrust liability instantly upon expiration of the existing agreement.

In addition to the obvious implications of "instant" antitrust liability, plaintiffs' proposed standard completely disregards established labor law principles imposing upon the parties the duty to negotiate in good faith as to mandatory bargaining subjects following expiration of a collective bargaining agreement. *See NLRB v. Katz*, 369 U.S. 736, 747-48, 82 S.Ct. 1107, 1113-14, 8 L.Ed.2d 230 (1962). Under the survival doctrine, an employer cannot unilaterally change the terms and conditions of employment following expiration of a bargaining agreement, but must maintain the status quo at least until impasse. The labor law obligation to maintain the status quo means that an employer may not affect a unilateral change either for or against the interests of the employees. *Katz*, 369 U.S. at 742-43, 82 S.Ct. at 1111. Thus, in the instant case, even if defendants had unilaterally liberalized

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tations made during the course of negotiations, in public statements and in informal meetings, by the contents of its "Game Plan '87" brochure, and by the 27-day strike in the fall of 1987, plaintiffs made it unequivocally clear that they will not consent to continued imposition of the system of player restraints at issue.

the player restraints following expiration of the collective bargaining agreement, they could have been brought before the National Labor Relations Board and charged with a labor law violation. This Court is not willing to adopt a rule of law that exposes an employer to treble damage antitrust liability by meeting a labor law obligation.

Even more troublesome to the Court, however, is the likelihood that plaintiffs' proposal would subvert the strong federal labor policy underlying the collective bargaining process. Rather than foster intense, good faith negotiations following termination of an agreement, plaintiffs' proposal invites the opposite behavior: in order to make it "unequivocally clear" that there is no longer consent to a particular practice, plaintiffs' standard essentially requires employees to refrain from negotiations and to adhere unyieldingly to a stated position. As plaintiffs' proposed standard would effectively undermine the federal labor policy underlying the collective bargaining process, that standard must be rejected.

In the alternative, plaintiffs apparently endorse the standard enunciated in *Bridgeman*, *supra*, for determining the point at which the labor exemption ends. The Court in *Bridgeman*, after rejecting various endpoints proposed by both parties, formulated its own standard:

> I find that the exemption for a particular practice survives only as long as the employer continues to impose that restriction unchanged, and reasonably believes that the practice or a close variant of it will be incorporated in the next collective bargaining agreement. When the employer no longer has such a reasonable belief, it is then unilaterally imposing the restriction on its employees, and the restraint can no longer be deemed the product of arm's-length negotiation between the union and the employer. *Bridgeman*, at 967.

The *Bridgeman* standard, while considerably more appealing than that proposed by plaintiffs, must also be rejected. The Court's principal objection to the *Bridgeman* test is that the standard does not give proper regard to the strong labor law policy promoting the collective bargaining process. Presum-

ably, an employer's "reasonable belief" that a practice will be incorporated in a new agreement is based upon various manifestations by the employees indicating assent or willingness to compromise. Knowing that a provision's exempt status would expire once an employer could no longer have a "reasonable belief" that the practice would be incorporated in a new agreement, employees would have every incentive to furnish the requisite indicia of disaffection and unwillingness to bargain. By encouraging employees to exhibit steadfast, uncompromising adherence to stated terms, the *Bridgeman* standard would subvert the strong federal labor law interest in promoting the collective bargaining process. As the *Bridgeman* test does not strike the proper accommodation between labor and antitrust interests, that test will also be rejected.

The endpoints suggested by defendants are also unacceptable. Defendants would like this Court to declare that a labor exemption concerning a mandatory bargaining subject survives indefinitely. Defendants urge that terms or conditions, once agreed to, become a fixed part of the status quo and that plaintiffs thereafter may alter those terms only by bringing economic pressure to bear upon the employer. Alternatively, defendants argue that a labor-exempt condition should remain in effect for the duration of the collective bargaining relationship.[18] Both proposals accord the labor exemption undue longevity. Indeed, defendants' suggested standards would accord greater longevity to illegal provisions than to lawful terms and conditions: in the usual context, following expiration of a collective bargaining agreement, lawful provisions relating to wages, hours and terms and conditions of employment continue in effect only until "impasse." "Impasse" merely signifies a stalemate in negotiations, and is not equivalent to termination of the collective bargaining relationship.[19] Thus, defendants' proposed standards would

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18 Generally the collective bargaining relationship between an employer and a particular union exists for as long as that union continues to be the recognized bargaining representative of a majority of the employees.

19 "As a recurring feature in the bargaining process, impasse is only a temporary deadlock or hiatus in negotiations 'which in almost all cases is

lead to the anomalous result that illegal provisions exempted from antitrust scrutiny would continue in force longer than lawful terms and conditions. The Court cannot adopt a rule of law that accords labor-exempted provisions greater longevity than lawful ones. Accordingly, defendants' proposed standards must also be rejected.

The Court, having rejected the parties' proposals, must devise for itself the point at which the labor exemption ends. After balancing the various competing interests, the Court concludes that proper accommodation of labor and antitrust interests requires that a labor exemption relating to a mandatory bargaining subject survive expiration of the collective bargaining agreement until the parties reach impasse *as to that issue*; thereafter, the term or condition is no longer immune from scrutiny under the antitrust laws, and the employer runs the risk that continued imposition of the condition will subject the employer to liability.

The test applied in determining whether the parties have reached impasse as to a particular issue is the same as that applied in determining impasse in the negotiations as a whole.[20] The test is simply whether, following intense, good faith negotiations, the parties have exhausted the prospects of concluding an agreement. *Taft Broadcasting Co.*, 163 NLRB at 478. Impasse is generally synonymous with deadlock: it occurs when the parties have discussed the matter and, despite their best efforts to achieve agreement, neither is will-

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eventually broken, through either a change of mind or the application of economic force.' " *Charles D. Bonanno Linen Service, Inc. v. NLRB*, 454 U.S. 404, 412, 102 S.Ct. 720, 725, 70 L.Ed.2d 656 (1982) (quoting *Charles D. Bonanno Linen Service, Inc.*, 243 N.L.R.B. 1093, 1093-1094 (1979)).

20 In *Taft Broadcasting Co.*, the National Labor Relations Board enumerated some of the considerations in making an "impasse" determination:

> Whether a bargaining impasse exists is a matter of judgment. The bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of negotiations are all relevant factors to be considered in deciding whether an impasse in bargaining existed.

Taft Broadcasting Co., 163 NLRB Dec. (CCH) at 478.

ing to move from its position. No impasse can occur until there appears no realistic possibility that continuing discussions concerning the provision at issue would be fruitful. *See Mariott In-Flite Servs., Div. of Mariott Corp.*, 258 NLRB Dec. (CCH) 755, 108 L.R.R.M. (BNA) 1287 (1981), *enforced*, 113 L.R.R.M. (BNA) 3528, *aff'd* 729 F.2d 1441 (2nd Cir.1983), *cert. denied*, 464 U.S. 829, 104 S.Ct. 105, 78 L.Ed.2d 108 (1983); *Morco, Inc. d/b/a Town Plaza Hotel*, 258 NLRB (Dec. (CCH) 69, 108 L.R.R.M. (BNA) 1126 (1981); *J.D. Lunsford Plumbing, Heating & Air Conditioning, Inc.*, 254 NLRB Dec. (CCH) 1360, 107 L.R.R.M. (BNA) 1033 (1981), *aff'd*, 684 F.2d 1033 (D.C.Cir.1982).

Under the Court's formulation, a determination that the parties have reached impasse as to a particular issue results in termination of the labor exemption protecting that particular provision. In the instant case, once the parties reach impasse concerning the player restraint provisions, those provisions will lose their immunity and further imposition of those conditions may result in antitrust liability.[21]

The Court's formulation has a number of advantages over the standards proposed by the parties. First, unlike plaintiffs' proposal, the Court's formulation respects the labor law obligation to bargain in good faith over mandatory bargaining subjects following expiration of a collective bargaining agreement. Additionally, by requiring the parties to bargain in good faith until impasse, the Court's standard promotes the collective bargaining relationship and enhances prospects that the parties will reach a compromise on the issue. The Court's formulation seems especially appropriate in light of the Eighth Circuit's observation in *Mackey*, *supra*, that:

> It may be that some reasonable restrictions relating to player transfers are necessary for the successful operation of the NFL. The protection of mutual interests of both the players and the clubs may indeed require this. We encourage the parties to resolve this question through collective bargaining. The parties are far better

21 Of course, liability will attach only if the challenged practices do in fact violate the antitrust laws.

> situated to agreeably resolve what rules governing player transfers are best suited for their mutual interests than are the Courts.

543 F.2d at 623.

The Court's formulation, while lending full respect to labor interests, does not substantially override antitrust concerns. By allowing a labor exemption to survive only until impasse, the law will not insulate a practice from antitrust scrutiny, but will only delay enforcement of the substantive law until continued negotiations over the challenged provision become pointless. The Court's formulation thus strikes a better accommodation between the competing labor and antitrust interests than any of the tests proposed by the parties.

In sum, the Court holds that the nonstatutory labor exemption insulated the Right of First Refusal/Compensation system and the NFL Player Contract during the life of the 1982 Collective Bargaining Agreement, and that the labor exemption will continue to protect the challenged restraints until the parties reach impasse as to those issues.

Whether the parties have, in fact, reached impasse as to the free agency issues is not clear.[22] Even if the evidence were clear, however, the Court could not make the impasse determination at this time. As noted, the duty to bargain in good faith concerning mandatory bargaining subjects continues until impasse. In the instant case, defendants have filed a charge with the NLRB alleging that plaintiffs have not bargained in good faith. Because a finding of good faith must be made as a precondition to determining impasse, the Court must await the NLRB's "good faith" determination.

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22 Notwithstanding the various actions and representations made by the parties, it does not appear that the players and management are engaged in the "head-on encounter of irresistible force and immovable body." *Fetzer Television, Inc. v. NLRB*, 317 F.2d 420 (6th Cir.1963). There is abundant evidence in the record to indicate the parties are not so far apart in negotiations as this lawsuit would suggest. For example, plaintiffs are not demanding unrestricted free agency, but only that a player be free to move, without substantial restriction, at *some point* in his career. Likewise, defendants have exhibited a willingness to bargain by proposing substantial modifications to the existing system.

Accordingly, the Court shall also stay decision of the remaining motions pending determination of the "impasse" question.

IT IS SO ORDERED.

bility of conflict between [a] regulatory policy and federal antitrust policy is an insufficient basis for implying an exemption from the federal antitrust laws." *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 596 (1976).

The Court of Appeals' extension of the nonstatutory labor exemption to the antitrust laws thus presents a significant break with honored rules of construction. For that reason alone, the decision should be reviewed by this Court. At stake, however, are more than general legal principles. The decision opens a significant loophole in the antitrust laws that can extend well beyond professional football.

Under the Eighth Circuit's holding, a multi-employer group can immunize an otherwise illegal restraint of trade by putting it forward in the course of negotiations with a union, at least if it pertains to a mandatory subject of collective bargaining. This opens wide opportunities for employers to engage in cartel-like hiring practices. Under present law, employers can agree to propose identical terms and conditions of employment in union negotiations. The Eighth Circuit has extended this right to allow employers to agree to impose these identical terms in the absence of a collective bargaining agreement. Competition between employers can be eliminated by their own agreement.

The specific mobility restraints at issue in this case are probably unique to professional football. Other restraints of this type, however, are economically feasible in any unionized industry involving non-fungible employees. Employers of musicians, actors, journalists, and the like are now free to agree horizontally not to bid against each other for the services of desirable individuals, so long as they put their restraint forward in labor negotiations. Even where labor is essentially fungible, as with unskilled or semi-skilled workers, employers can still avoid wage competition among themselves by proposing a wage level during bargaining, and agreeing to impose it if no labor agreement is reached. The antitrust exemption that unions worked decades to persuade Congress to enact for them is now converted into a gift to manage-

ment. As enforcers of the antitrust laws, this prospect is of major importance to the Amici States. If the Eighth Circuit's view really is the law, this Court should say so.

The decision of the Court of Appeals also drastically alters the incentives for collective bargaining. As noted, the decision gives employers a new and perverse reason to bargain collectively with unions, without reaching agreement with them. If they put forward a restraint of trade in the form of a proposal, then so long as the union exists and regardless of whether or not it accepts the proposal, they can agree to impose it without fear of antitrust liability. The NFL's suit to undecertify the players' union is designed to take advantage of this device.[9]

Employees, on the other hand, will now be more reluctant to organize and enter into collective bargaining, for doing so will cost them the protection of the antitrust laws. Bargaining by existing unions will also be affected. In the past, a union might do what the football players union did in 1982: agree to a restraint sought by management in exchange for some benefit to the employees. The Eighth Circuit's holding, however, means that once the term of the collective bargaining agreement has expired, employers can retain their restraint while discarding the employee benefit they had previously granted in exchange. The only path left to the union is to withdraw from collective bargaining altogether, as the football player's union did here.

The Amici States do not enforce federal labor law. They do have an interest in stable labor-management relations and in collective bargaining. *See, e.g.*, Ariz. Rev. Stat. §§ 23-1301 *et seq.*; Haw. Rev. Stat. ch. 377; La. Rev. Stat. § 23:822; Mich. Comp. Laws § 423.1; N.Y. Labor Law § 700; Tex. Lab. Code §§ 5154a, 5207a; Utah Code §§ 34-19-1, 34-20-1;

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9 The second and third counts of the NFL's new suit against the union seeks a declaratory judgment that in the absence of any collective bargaining agreement with the union, the mobility restraints agreed on and collectively imposed by the owners are exempt from the antitrust laws. *The Five Smiths, Inc., et al. v. National Football League Players Association*, 3-90-CV-177 (D. Minn., complaint filed March 30, 1990).

Wyo. Stat. § 27-7-101. Because the decision of the Court of Appeals is likely to have a major impact on that interest, they support the petition for certiorari.

CONCLUSION

The opinion of the Court of Appeals for the Eighth Circuit departs drastically from decisions interpreting labor law and policy and from well-settled precedents construing antitrust exemptions. It creates an expansive new shelter from the antitrust laws and the rigors of a free market and adds significantly to the costs of collective bargaining for employees. Because of the importance of the issues involved in this case and the implications of the reasoning and holding of the Court of Appeals, the Amici States urge this Court to grant the petition for certiorari.

Dated: May 8, 1990

Respectfully submitted,

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MAY 15 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

MARVIN POWELL, BRIAN HOLLOWAY, MICHAEL KENN, MICHAEL DAVIS, JAMES LOFTON, MICHAEL LUCKHURST, DAN MARINO, GEORGE MARTIN, and STEVE JORDAN, on behalf of themselves and all class members,

Petitioners,

—v.—

NATIONAL FOOTBALL LEAGUE, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION

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REPLY BRIEF IN SUPPORT OF PETITION

INTRODUCTION

In opposing the Petition for Writ of Certiorari, respondents do not dispute that the questions presented by the Petition are of enormous importance to both antitrust and labor law policy. Rather, respondents' opposition seeks primarily to argue the merits, which are not yet before this Court, and to obscure the final and conclusive nature of the judgment below. Neither of these arguments can change the fact that the Eighth Circuit's decision finally dismissed petitioners' past antitrust claims against the First Refusal/Compensation system and directly conflicts with this Court's prior decisions regarding the non-statutory labor exemption.

I. THE JUDGMENT BELOW CONCLUSIVELY AND FINALLY ADJUDICATES ALL PETITIONERS' PAST RESTRAINT-OF-TRADE CLAIMS AGAINST THE FIRST REFUSAL/COMPENSATION SYSTEM.

1. Respondents' argument that the Petition is premature (Opp. at 9-11) is specious. The 2-1 majority of the Court of Appeals unequivocally and finally determined that petitioners could not maintain a restraint of trade claim against respondents' unilateral continuation of the First Refusal/Compensation system through the 1989 NFL season, *after* the collective bargaining agreement had expired and *after* impasse had been reached in efforts to reach a new agreement:

> In sum, we hold that the antitrust laws are inapplicable under the circumstances of this case as the nonstatutory labor exemption extends beyond impasse. We reverse the order of the district court and *remand the case with instructions to enter judgment in defendants' favor on Counts I, II, and VIII of plaintiffs' amended complaint.*

(Pet. App. 19a) (emphasis added). The pendency of other claims cannot obscure one undeniable fact: the critically

important questions of federal labor and antitrust policy raised by this ruling are now ripe for this Court's review.[1]

As respondents themselves have acknowledged, in successfully petitioning for interlocutory review of the district court's ruling under 28 U.S.C. ¶ 1292(b), the labor exemption issue constitutes a discrete and controlling question of law, the resolution of which determines, as a threshold matter, whether the district court will ever hear the antitrust merits of petitioners' claims. Every appellate decision rendered pursuant to § 1292(b) is, by definition, "interlocutory." That fact has not inhibited this Court from routinely granting certiorari to review such decisions in appropriate cases.[2]

By asserting that certiorari should be denied because there are still issues awaiting resolution by the district court, respondents imply that an immediate review of the Eighth Circuit's decision would be an inefficient use of judicial resources. That is not so. The only remaining claims in the

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1 Contrary to respondents' assertion, there is no prospect that "renewed collective bargaining may render review" of the Eighth Circuit's decision "unnecessary." (Opp. at 8). To prevent respondents from enjoying what Chief Judge Lay described as a "Shangri-La of everlasting immunity from the antitrust laws" (Pet. App. 30a), the players' bargaining representative, the NFLPA, formally renounced its bargaining rights on November 6, 1989 (Pet. App. 62a). Notwithstanding respondents' naked assertion to the contrary (Opp. at 8), the NFLPA completed the process of renouncing its bargaining rights on December 5, 1989 when its Board of Directors adopted entirely new By-Laws which expressly forbid any officer, member or employee of the Association from participating in, or acting as an agent for, collective bargaining.

The recently-filed suits by the respondents and by eight players concerning respondents' unilateral imposition of the so-called Plan B player restraints *after* February 1, 1990 (Opp. at 9-10) do not involve respondents' post-expiration and/or post-impasse imposition of the First Refusal/Compensation system on Powell class members during the 1987, 1988 and 1989 NFL seasons. It is that past conduct, and only that past conduct, which the Eighth Circuit majority has now exempted from the antitrust laws.

2 *See, e.g., Finley* v. *United States*, _____ U.S. _____, 109 S. Ct. 2003, 2005 (1989); *Chan* v. *Korean Air Lines Ltd.*, _____ U.S. _____, 109 S. Ct. 1676, 1679 (1989); *Arizona* v. *Maricopa County Medical Society*, 457 U.S. 332, 336-37 (1982); *Catalano, Inc.* v. *Target Sales, Inc.*, 446 U.S. 643, 644 (1980).

case involve challenges either to *different* conduct by respondents, or to conduct which occurred *after* the NFLPA ended its role as a collective bargaining representative, as to which the overriding labor exemption issue presented by this petition is not relevant.

2. Respondents' position opposing certiorari here stands in stark contrast to their position before this Court when they were seeking review of the Eighth Circuit's previous decision on the labor exemption issue in *Mackey* v. *National Football League*, 543 F. 2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977). As respondents then stated:

> [T]he appropriate accommodation of national labor and antitrust policies is a matter of great and continuing importance to the future of labor-management relations in professional sports. *It is also of basic importance throughout industry and business of all kinds.* (emphasis added) (citations omitted) . . .
>
> Justice Marshall dissenting in *Flood* v. *Kuhn*, 407 U.S. 258, 293-96 (1972), called for a resolution of the interrelationship in professional sports between the antitrust laws and the labor laws. Review by this Court is clearly warranted here to provide guidance as to the requisite accommodation . . . .

NFL Petition for Writ of Certiorari in No. 76-932, at 21-23.

Despite extensive litigation in the lower courts since respondents voluntarily dismissed their petition in *Mackey*,[3] this Court has yet to provide "guidance as to the requisite accommodation" between the labor and antitrust laws for which respondents pleaded in *Mackey*. Thirteen years later, this case provides the proper vehicle for this Court to resolve these controlling questions of labor and antitrust policy, which have critical implications, not only for professional sports, but as respondents once noted, "throughout industry and business of all kinds." (*See also* Brief of Amici Curiae submitted by State Attorneys General; Brief of Amici Curiae

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3 *See* Pet. at 15-16 and accompanying notes.

submitted by the National Basketball Players Association and National Hockey League Players Association).

In short, this Court should grant certiorari to answer the question which even respondents concede is of national importance—the point at which the non-statutory labor exemption ends. While respondents argue that the Eighth Circuit's decision creates such a point sometime short of union renunciation of collective bargaining (Opp. at 7-8, 13), *nowhere* in respondents opposition is there even a hint as to when this occurs. Respondents seek to defer indefinitely this Court's consideration of the labor exemption issue because respondents know that they cannot defend their restraints on the antitrust merits.[4] Members of the petitioner class are continuing to suffer irreparable injury to their short playing careers while they await final judicial guidance on this issue.[5] Only a decision by this Court can provide such guidance to the "literally millions of employees" engaged in multiemployer bargaining. (Opp. at 17).

II. RESPONDENTS HAVE COMPLETELY MISCONSTRUED THE DECISIONS OF THIS COURT IN ARGUING THAT THE EIGHTH CIRCUIT'S JUDGMENT IS CONSISTENT WITH SETTLED LAW

1. Respondents argue that *Connell*, *Jewel Tea* and *Pennington*[6] have no application to restraints on player move-

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4 Significantly, the two cases that respondents cite as supporting their "competitive balance" antitrust defense in this case (Opp. at 2 n.2) actually held respondents' conduct to be antitrust violations.

5 Indeed, the district court below found it "probable that . . . at least some of the players are likely to sustain irreparable harm. . . ." *See Powell* v. *National Football League*, 690 F. Supp. 812, 818 (D. Minn. 1988). *See also, e.g.*, *Haywood* v. *National Basketball Ass'n*, 401 U.S. 1204 (1971) (reinstating injunction pendente lite issued in *Denver Rockets* v. *All-Pro Management, Inc.*, 325 F. Supp. 1049 (C.D. Cal. 1971)); *Linseman* v. *World Hockey Ass'n*, 439 F. Supp. 1315, 1319-20 (D. Conn. 1977); *Bowman* v. *National Football League*, 402 F. Supp. 754, 756 (D. Minn. 1975).

6 *Connell Construction Co.* v. *Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616 (1975); *United Mine Workers of Am.* v. *Pennington*, 381 U.S. 657 (1965); *Local Union 189, Amalgamated Meat Cutters and Butcher Workmen of North Am.* v. *Jewel Tea Co.*, 381 U.S. 676 (1965).

ment in professional sports because such restraints assertedly restrain competition solely in a "labor market" and thus are of no concern under the antitrust laws (Opp. at 15). This argument ignores *Radovich* v. *National Football League*, 352 U.S. 445 (1957)—which respondents fail even to cite—where precisely such claims were held cognizable under the antitrust laws. It also ignores the numerous other decisions of this Court where the antitrust laws have been applied to restraints in employment markets.[7] Indeed, it was because the Sherman Act does apply to restraints in markets for employee services that Congress enacted the statutory labor exemption, which exempts *only* union, but not employer, restraints in such labor markets from antitrust scrutiny. 15 U.S.C. § 17 (1982).

The decisions in *Connell*, *Jewel Tea* and *Pennington* are not to the contrary. These cases examined whether the restraints at issue restricted competition in non-labor markets only because, unlike here, the unions were the defendants (being sued by third party employers), and the labor market effects of the restraints *had been agreed to* by the union, and thus shielded from the antitrust laws. (Pet. at 13-15).[8] Where, as here, there is no such unexpired agreement with a union, the teaching of these cases is that the non-statutory labor exemption is inapplicable and the antitrust laws must be applied to the anticompetitive effects of the restraints in labor markets. (Pet. at 15-17)[9] Even if there were any colora-

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7 *See, e.g.*, *Federal Trade Comm'n* v. *Superior Court Trial Lawyers Ass'n*, ____ U.S. ____, 110 S. Ct. 768 (1990); *National Society of Professional Engineers* v. *United States*, 435 U.S. 679 (1978); *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975); *Anderson* v. *Shipowners Ass'n of Pacific Coast*, 272 U.S. 359 (1926). *Cf. Mackey* v. *National Football League*, *supra*, 543 F.2d at 617-19; *Smith* v. *Pro-Football*, 593 F.2d 1173, (D.C. Cir. 1978).

8 *See also Richards* v. *Nielsen Freight Lines*, 810 F.2d 898, 905 (9th Cir. 1987) (Kennedy J.) ("[t]he nonstatutory exemption prevents the antitrust laws from being used to frustrate the primary and legitimate goal of the federal labor law, which is to permit employees to organize and act to improve wages and working conditions").

9 Nor can respondents find any support for their position that labor market restraints are exempt from the antitrust laws in the inapposite line of

ble basis to respondents' revisionist thesis that *Connell*, *Jewel Tea* and *Pennington* somehow meant to hold that the antitrust laws do not apply to labor market restraints, surely this is just the type of landmark legal issue which warrants review by this Court.

The Eighth Circuit's holding that the non-statutory exemption extends beyond expiration, beyond impasse, and even insulates restraints never contained in a bargaining agreement as long as they were "forwarded in negotiations" by employers simply cannot be squared with this Court's decisions in *Connell*, *Pennington*, and *Jewel Tea*. Writing for the Court majority, Justice White declared in *Pennington* that even where the restraints benefitted labor and involved a mandatory subject of bargaining, they would not be "automatically exempt from Sherman Act scrutiny . . . regardless of the subject of the form and content of the *agreement*." 381 U.S. at 664-65 (emphasis added). In so holding, a clear majority of the Court expressly rejected the views of Justice Goldberg, who dissented in *Pennington* and wrote separately in *Jewel Tea*, urging that *any* labor agreement conforming to the labor laws should be exempt. 381 U.S. at 727-28. The Eighth Circuit has extended the exemption three giant steps further than even Justice Goldberg (whose views have never been adopted by this Court) would have. Under the panel majority's formulation: (a) no agreement or other manifestation of consent by the union to continuation of the restraint is required; (b) the restraints are immune from scrutiny even if they further no union objectives but serve only to eliminate competition among the employers; and (c) all such restraints

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cases challenging employer labor tactics for resisting union *bargaining* demands—e.g., lockouts, employer strike insurance, and the hiring of replacement workers. (Opp. at 16). These cases involved employer activity directed, not at any market for employee services, but at *union activity* itself. In such situations, the antitrust laws do not apply because injury to the union's ability to bargain—as opposed to the antitrust injury caused to employees by agreements to eliminate competition for employees' services—is not "antitrust injury" within the scope of the Sherman Act. *See Associated General Carpenters of California, Inc.* v. *California State Council of Carpenters*, 459 U.S. 519, 540 (1983).

are immune as long as they were proposed in bargaining, regardless of the union's emphatic rejection of them.

This unprecedented expansion of antitrust immunity runs directly counter to this Court's decisions carving out a very limited immunity for only certain types of agreements which operate to benefit employees and calls urgently for this Court's review.

2. There is similarly no ground for this Court to deny certiorari on the basis of respondents' claim that they should not be held liable under the antitrust laws for doing only what the labor laws purportedly require—refraining from implementing changes in employment terms after expiration of a collective bargaining agreement in violation of their labor law duty to bargain. (Opp. at 11-13). Even were this a correct characterization of the Eighth Circuit's ruling, it would only underscore the importance of having this Court review that decision to define a proper balance between antitrust and labor policy. But this argument argues for a *reversal* of the actual ruling of the Eighth Circuit, which in fact extends the labor exemption far beyond any purported labor law duty of an employer to maintain the status quo.[10]

Even respondents concede that the labor laws do *not* require employers to maintain the terms and conditions of an expired agreement beyond an "impasse" in bargaining. Once impasse has been reached, employers are free under the labor laws "to implement new terms of employment . . . ." (Opp. at 13). But that does not automatically immunize restraints collectively imposed by a group of competitors from antitrust scrutiny. Respondents' assertion that they were somehow fulfilling a duty of labor law in carrying forward the challenged restraints after impasse—not to mention instituting an entirely *new* system of Plan B restraints—is pure sophistry.

Indeed, if impasse is the correct endpoint for the nonstatutory labor exemption, respondents' conduct here illustrates plainly why certiorari should be granted. It was only because an impasse had been reached in the negotiations that

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10 Here, the District Court found that impasse had been reached, as did the NLRB General Counsel (Pet. App. 4a).

respondents were able, under the labor laws, to impose the *new* Plan B restraints never previously agreed to by the union and, at the same time, drastically reduce the benefits to players provided in the expired collective bargaining agreement. Respondents' contention that they have *not* eliminated or reduced the collective bargaining benefits to players, while continuing their anticompetitive restraints, is simply wrong. (Opp. at 5 n.5). The NLRB has already accepted respondents' argument that they no longer have to make contributions to the players' pension plan because the collective bargaining agreement requiring such payments expired.[11] In addition, the severance benefits to players have been completely eliminated by respondents. Petitioners thus no longer have the benefits that they received in exchange for their original consent to respondents' restraints for a fixed period of time, while the Eighth Circuit holds that the labor exemption benefiting respondents continues indefinitely. There could be no stronger case for this Court to grant certiorari to make it clear that the non-statutory labor exemption cannot possibly extend to such post impasse restraints.

3. There is, of course, no logic to respondents' claim that because petitioners believe that the proper endpoint of the non-statutory labor exemption occurs at contract expiration (Pet. at 12-17), this somehow makes the Eighth Circuit's decision rejecting both contract expiration and impasse as the endpoint for the labor exception *less* worthy of review by this Court. (Opp. at 11-13). If impasse is the correct endpoint, this is all the more reason to grant, not deny, certiorari in this case. Respondents offer absolutely no support for the Eighth Circuit's extension of the non-statutory labor exemption beyond expiration of the agreement, beyond impasse, to a point that no one has yet identified.

4. There is also no basis for respondents' argument that certiorari should be denied because petitioners "have available to them a full array of economic and legal weapons" and therefore should not be permitted to maintain an antitrust

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11 *See* Ruling of NLRB Regional Director, Sept. 15, 1989 and Ruling of NLRB Office of Appeals, April 6, 1990, attached hereto as Exh. A.

action when they have "an adequate, and exclusive remedy at the NLRB . . . ." (Opp. at 19).

This Court has, at least three times, held that antitrust claims are *not* foreclosed by the existence of NLRB remedies for violation of the labor laws. In *Connell*, the Court stated:

> There is no legislative history . . . suggesting that . . . Congress thought allowing antitrust remedies in cases like this would be inconsistent with the remedial scheme of the NLRA.

421 U.S. at 634 (footnote omitted). In *Jewel Tea*, the Court earlier noted that:

> [E]ven in the few instances when the antitrust action could be framed as a refusal to bargain charge, there is no guarantee of Board action . . . [because] [i]t is the function of the Board's General Counsel rather than . . . a private litigant to determine whether an unfair labor practice complaint will ultimately issue.[12]

In *Kaiser Steel Corp.* v. *Mullins*, 455 U.S. 72 (1982), the Court again stressed that the availability of an NLRB remedy did not foreclose the federal courts from deciding whether an "agreement" violated the antitrust laws. *Id.* at 85.

Respondents' reiteration of the Eighth Circuit's erroneous view that the NLRB remedy displaces antitrust policy serves only to highlight the direct conflict between the decision below and the decisions of this Court.

5. That respondents' view of the decisions of this Court could be so diametrically opposed to the views of not only petitioners, but to those of eight sovereign states (*See* Brief of Amici Curiae submitted by State Attorneys General), simply underscores the need for this Court to resolve the uncertainty in this area of the law. Once and for all, the endpoint of the non-statutory labor exemption should be unequivocally estab-

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12 The Court stated that it knew "of no case where the court has ordered reference [to an agency] of an issue which the administrative body would not itself have jurisdiction to determine . . . ." *Id.* at 687-88.

lished so that employees and employers can know when the labor exemption ends and antitrust law begins.

CONCLUSION

This case presents issues of antitrust and labor law policy of overriding importance. The petition should be granted and the judgment below reversed.

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APPENDIX

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September 15, 1989

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Attorney at Law
1140 Connecticut Avenue, NW
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Re: National Football League
Management Council
Case 5-CA-20006

Dear Mr. Yablonski:

The above-captioned case, charging violations under Section 8 of the National Labor Relations Act, as amended, has been carefully considered.

The charge alleges that the Employer violated Section 8(a)(1) and (5) and 8(d) by: (1) failing and refusing to contribute $11,340,000 to the Bert Bell NFL Player Retirement Plan (the Plan) on or about March 31, 1988, and (2) failing and refusing to contribute a separate payment of $1,160,000 to the Plan on or about March 31, 1988. As a result of the investigation, it does not appear that the Employer violated the Act by failing and refusing to make the $11,340,000 contribution.

Under *Cauthorne Trucking*, 256 NLRB 721 (1981), an employer may be relieved of a post-contractual obligation to contribute to health, welfare or pension plans that are part of a collective-bargaining agreement if: (1) the changes are made subsequent to the parties reaching a bargaining impasse, or

(2) the union has waived its right to bargain regarding the changes. The investigation reveals that the 1982 collective-bargaining agreement between the NFL Players' Association and the National Football League expressly requires payments to be made *beginning* April 1, 1982, and *ending* March 31, 1987. It also provided that further contributions were to be made "as provided in the Collective Bargaining Agreement effective during such years". Also, in the 1970 and 1977 collective-bargaining agreements, identical language regarding the Plan was used, and at the expiration of each agreement the Employer ceased contributions. There is no evidence that the Union ever voiced dissatisfaction with that arrangement. Accordingly, it appears that the express language of the 1982 agreement and the parties' past bargaining history establish that the Union waived its right to bargain over the issue of continued contributions.

In addition, it also appears that the parties reached a good-faith impasse in negotiations on October 11, 1987. At that point the Employer was free to implement its last offer, including its offer concerning plan contributions. Because the Employer's pre-impasse proposal did not include the $11,340,000 contribution and because the Employer was not contractually obligated to make that contribution, it was free not to contribute the $11,340,000.

For the foregoing reason, further proceedings in this matter are not warranted, and I am refusing to issue complaint in this matter. However, this decision does not affect the remaining allegation concerning the separate $1,160,000 contribution. Disposition of that portion of the charge is being further processed by the Region.

Pursuant to the National Labor Relations Board's Rules and Regulations, you may obtain a review of this action by filing an appeal with the Acting General Counsel, addressed to the Office of Appeals, Room 1154, National Labor Relations Board, Washington, D.C., 20570, and a copy with me. This appeal must contain a complete statement setting forth the facts and reasons upon which it is based. The appeal must be

received by the Acting General Counsel in Washington, D.C., by the close of business on September 29, 1989. Upon good cause shown however, the Acting General Counsel may grant special permission for a longer period within which to file. Any request for extension of time must be submitted to the Office of Appeals in Washington and a copy of any such request should be submitted to me.

If you file an appeal, please complete the notice forms I have enclosed with this letter and send one copy of the form to each of the other parties. Their names and addresses are listed below. The notice forms should be mailed at the same time you file the appeal, but mailing the notice forms does not relieve you of the necessity for filing the appeal itself with the Acting General Counsel and a copy of the appeal with me within the time stated above.

Very truly yours,

/s/ LOUIS J. D'AMICO
Louis J. D'Amico
Regional Director

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
OFFICE OF THE GENERAL COUNSEL
Washington, D.C. 20570

April 6, 1990

Re: National Football League
Management Council
Case Nos. 5-CA-20006
5-CA-20421

Mr. Joseph A. Yablonski
Attorney at Law
Yablonski, Both & Edelman
1140 Connecticut Avenue, NW
Washington, DC 20036

Dear Mr. Yablonski:

Your request for reconsideration of our decision to sustain the Regional Director's refusal to issue complaint in Case No. 5-CA-20006 and your appeal from the Regional Director's refusal to issue complaint in Case No. 5-CA-20421 have been duly considered. After a complete review of the entire matter, including your appeal, the arguments raised in your request for reconsideration and the arguments raised during your oral presentation, it was decided to deny the motion for reconsideration in Case No. 5-CA-20006 and the appeal in Case No. 5-CA-20421.

The charges concern, in relevant part, the failure of the Employer to continue making $11,340,000 pension payments after the expiration of the 1982-7 contract. As stated in the letter denying your appeal in Case No. 5-CA-20006, the use of the word "ending" in the contract between the Union and the Employer clearly expresses an intent to terminate the Employer's pension contribution obligation. While you contend that the word "ending" should be read to mean the

ending of a time period rather than the ending of an obligation, Article XXXIV, Section 2, of the last collective bargaining agreement, states that "[c]ontributions in future years will be as provided in the collective bargaining agreement effective during such years." This provision was viewed as expressing termination of the pension obligation, absent execution of a new agreement. The fact that the contract provides for specific contributions for specific periods of time leads to a similar conclusion. We note also that there was no bargaining history to the contrary. Thus the Employer's annual "catch up" payments to make up for contributions skipped after the expiration of an earlier contract were admittedly the result of negotiations rather than a mutual acknowledgement or legal finding that the obligation to make such contributions had survived that contract. Moreover, the fact that the plan itself lists the amount due after expiration of the contract as consisting of only the $1,160,000 payment was deemed further evidence to support the claim that the Employer's obligation regarding the $11,340,000 ceased after the contract expired. Finally, while in *General Tire & Rubber Company*, 274 NLRB 591 (1985), there was language addressing the first 90 days after expiration of a contract, unlike the instant case, the contract there was silent about what was to occur thereafter.

Very truly yours,

/s/ MARY M. SHANKLIN
Mary M. Shanklin, Director
Office of Appeals

For: Jerry M. Hunter
General Counsel

No. 89-1421

(6)

DEC 27 1990

JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

MARVIN POWELL, et al.,

Petitioners,

—v.—

NATIONAL FOOTBALL LEAGUE, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITIONERS' SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION

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Now that the United States has joined New York, Arizona, Hawaii, Louisiana, Michigan, Mississippi, Texas, Utah and Wyoming in urging the Court to review and overrule the decision below, the respondents have submitted a supplemental brief ("Supp.") in one final attempt to dissuade the Court from granting certiorari. While we hesitate to burden the Court with further submissions, petitioners feel it appropriate to respond briefly below to points raised in respondents' latest brief.

1. Nowhere in their Supplemental Brief do respondents dispute the Solicitor General's conclusion that "the petition presents a question of sufficient importance to the proper functioning of the labor and antitrust laws, and to the maintenance of industrial peace." Brief for the United States as Amicus Curiae ("U.S. Br.") at 19. Rather, respondents simply argue that the ultimate resolution of this important issue be delayed indefinitely. However, as the Solicitor General correctly noted:

> Although the district court's order is interlocutory, *no issues remain to be resolved on remand that bear on when the non-statutory labor exemption terminates. Nor will resolution of those issues develop a record that will aid in resolution of that issue.* Neither respondents (in appealing to the court of appeals), nor petitioners (who seek review in this Court), have identified any further fact finding necessary to determine the proper accommodation of labor and antitrust policies.

(U.S. Br. at 19) (emphasis added).[1]

Nor do respondents dispute the fact, as discussed in the Solicitor General's brief, that the present issue is potentially

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1 Moreover, the context of the present case—with a fully litigated record and findings of impasse both by the NLRB and the district court—is the best imaginable for a resolution of this important issue. If the decision below is permitted to stand, unions in other industries will follow the lead of the NFLPA and abandon union status immediately upon expiration rather than run the risk of bestowing perpetual antitrust immunity on their employer groups.

applicable to any unionized industry with multiemployer bargaining. Their only response is to contend erroneously that "the issues raised by petitioners have not previously surfaced." (Supp. at 2). This argument ignores *Bridgeman* v. *National Basketball Ass'n.*, 675 F. Supp. 960 (D.N.J. 1987), which is directly on point, as well as the numerous other cases from the D.C., Third, Second, Sixth and Ninth Circuits holding that the non-statutory labor exemption is limited to protecting union activity and union-employer agreements. *See* Pet. at 15-16.[2]

Indeed the variety of different formulations on this issue of the endpoint of the non-statutory labor exemption illustrates dramatically the need for this Court's intervention. Petitioners, the district court, the Court of Appeals, the Solicitor General, and the *Bridgeman* court have offered five different endpoints for the labor exemption. Only respondents have never proposed *any* endpoint to their antitrust immunity, resulting in the employer's "Shangri-La" alluded to below by Chief Judge Lay. (Pet. App. B at 28a).[3]

2. The remainder of respondents' arguments go to the merits. Respondents argue that the "impasse" standard espoused by the Solicitor General,[4] and by the district court

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2 Petitioners also continue to believe that the decision below conflicts directly with decisions of this Court construing the labor exemption, as well as decisions requiring exemptions from the antitrust laws to be narrowly construed. *See* Pet. at 13-15, 18-20.

3 Respondents also attempt to dissuade this Court from granting certiorari by alluding to the possibility of a labor settlement with the National Football League Players Association ("NFLPA"). Even if this were in any way relevant to the issue before this Court, the fact is that the NFLPA has been forced by the decision below to renounce its bargaining rights and cease to function as a labor organization. It is undisputed that there has been *no* collective bargaining in the industry for more than a year. There simply is *no* possibility of a collective bargaining agreement in the professional football industry.

4 Respondents mischaracterize the standard advocated by the Solicitor General as "rejecting" impasse as the termination point of the labor exemption. (Supp. at 1-2). The Solicitor General's standard adopts impasse as the "theoretical fulcrum for termination of the implied immunity." *See* U.S. Br. at 17.

below, is not a logical point for expiration of the labor exemption because impasse is "merely a 'temporary deadlock or hiatus in negotiations.' " (Supp. at 3). This objection is specious and ignores the fact that it is the *first* impasse in the negotiations that triggers the endpoint of the non-statutory labor exemption. Under labor law, the employer's obligation to maintain the previous contract's terms ends forever once the first impasse in the negotiations has been reached.[5]

Respondents also argue that impasse does not provide a "workable standard that could be used by employers to guide their conduct and to avoid treble damage liability." (Supp. at 4). Yet the concept of impasse has been developed by the courts and the NLRB for the precise purpose of defining the point at which employers are no longer obligated, under labor law, to adhere to the terms of an expired collective bargaining agreement. The legal standards for determining when collective bargaining negotiations have reached an impasse have been discussed and defined in a myriad of judicial decisions and NLRB proceedings spanning decades.[6]

3. Respondents contend that the Solicitor General "fails to appreciate that employers are not free at impasse to alter terms and conditions of employment in any manner they see fit." (Supp. at 4). Yet the very case cited by respondents confirms that "[i]f the parties were indeed at an impasse, then the employer's statutory duty to maintain the status quo during post contract negotiations . . . would end." *Laborers Health & Welfare Trust Fund* v. *Advanced Lightweight Concrete Co., Inc.*, 484 U.S. 539, 543 n.5 (1988) (citing cases).

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5 *See, e.g., Saunders House* v. *NLRB*, 719 F.2d 683, 686-87 (3d Cir. 1983), *cert. denied*, 466 U.S. 958 (1984); *NLRB* v. *Cone Mills Corp.*, 373 F.2d 595, 598-601 (4th Cir. 1967); Morris, *Developing Labor Laws* at p. 236 (2d ed. 1982).

6 Respondents' assertion that impasse is an illusive standard because "unions would be induced to declare negotiations at an impasse" and "[t]hat is precisely what happened in this case" is a highly misleading and grossly distorted version of the record. The facts are that the NFL players struck to eliminate these restraints and the NLRB found that the parties were at impasse in October 1987, long before the district court announced an impasse standard.

Respondents seek to create the impression that they have kept the benefits provided for in the expired agreement in place. (Supp. at 4). This is simply not true. They have unilaterally reduced employee insurance benefits in this hazardous industry, terminated severance pay of $10,000 or more per player, terminated pension contribution obligations of $12.5 million per year, eliminated mandatory salary increases and rescinded union security and dues checkoff provisions. *See*, *e.g.*, Pet. App. E at 59a-61a; Pet. Reply Br. App. A, B at 1a-5a. The Solicitor General aptly characterizes such provisions of the 1982 Collective Bargaining Agreement as the "quid pro quo" for the employees' acceptance of the restraints. As the Solicitor General correctly noted:

> By extending the . . . exemption past the time when the employers may unilaterally diminish or rescind elements of that quid pro . . . the court of appeals . . . gives the party benefitting from [an] anticompetitive restraint . . . the benefit of the . . . exemption without having to pay for it.[7]

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7 Under labor law certain provisions of an expired collective bargaining agreement—including provisions vital to the union's survival and practical ability to bargain, such as those pertaining to union security and dues checkoff—can be rescinded unilaterally by the employers immediately on expiration of the agreement. Here, the respondents did, in fact, unilaterally rescind the previously bargained union security and dues checkoff provisions and terminated $12.5 million in pension obligations immediately on expiration of the agreement. Thus, employers are allowed, even prior to impasse, to rescind provisions which are fundamental to the union's very existence and ability to bargain effectively. In contrast, under the decision below, the players are saddled indefinitely beyond both contract expiration and the point of impasse with their prior acceptance of the anticompetitive restraints deemed vital by the employers. The "asymmetry" of the Court of Appeals' holding is thus even more distorted than the Solicitor General has perceived. While the Solicitor General has correctly urged that the exemption must end immediately upon the employers' implementation of a post-impasse change in the previously-bargained quid pro quo, the exemption must also end immediately upon the employers' *pre*-impasse alteration of the previously-bargained quid pro quo.

(U.S. Br. at 15). Moreover, in March of this year, the respondents unilaterally changed significant terms and conditions of employment by extending the NFL playing season from 16 weeks to 17 weeks in 1990 and 1991, and from 17 weeks to 18 weeks in 1992 and 1993. Respondents have also reduced team rosters. All of the above changes have further deprived NFL players of the quid pro quo contained in the expired collective bargaining agreement.[8]

4. Finally, respondents assert that "it is undisputed that the restraint at issue here does not affect in any way 'competition in business markets'; the restraint's only effect is in a labor market." (Supp. at 5). This argument—that anticompetitive agreements to restrain trade in a market for employee services do not violate the antitrust laws—has never been accepted by a single court anywhere.[9] To the contrary, this Court has uniformly held that the Sherman Act prohibits employers from unreasonably restraining trade in a market for employee or professional services. *See, e.g., Federal Trade Comm'n* v. *Superior Court Trial Lawyers Ass'n.*, ____ U.S. ____, 110 S. Ct. 768 (1990); *National Society of Professional Engineers* v. *United States*, 435 U.S. 679 (1978); *Radovich* v. *National Football League*, 352 U.S. 445 (1957); other cases cited in Pet. at 12 n.5, 23 n.17, Pet. Reply Br. at 5 n.7.[10]

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8 Respondents also neglect to mention that the current Plan B system being imposed includes a new "wage scale," to be implemented in 1993. Pet. App. E.

9 *Wood* v. *National Basketball Ass'n.*, 809 F.2d 954 (2d Cir. 1987), cited by respondents, has no application here. In *Wood*, the nonstatutory labor exemption was held applicable because the challenged restraints *were* at that point approved of by the union in an unexpired collective bargaining agreement.

10 Indeed, as pointed out in Pet. Reply Br. at 5, it was precisely because the Sherman Act does apply to such restraints that Congress enacted the statutory labor exemption, exempting only union activities.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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No. 89-1421

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In the Supreme Court of the United States

OCTOBER TERM, 1990

MARVIN POWELL, ET AL., PETITIONERS

v.

NATIONAL FOOTBALL LEAGUE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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25 pp

QUESTION PRESENTED

Whether members of a multi-employer bargaining unit may claim the protection of the nonstatutory labor exemption from the federal antitrust laws after a collective bargaining contract has expired and the parties have reached an impasse in negotiations over a new contract.

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In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 89-1421

MARVIN POWELL, ET AL., PETITIONERS

v.

NATIONAL FOOTBALL LEAGUE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

Petitioners are professional football players [1] who claim that respondents, the National Football League (NFL) and its member teams, have violated the federal antitrust laws by maintaining rules restricting the ability of players to move freely among teams after the expiration of a multi-employer collective bargaining agreement containing such rules. Respondents contend that their rules are immune from antitrust scrutiny under the nonstatu-

[1] The players' union is also named as a plaintiff in the complaint. After the court of appeals' decision, the union announced that it was abandoning its collective bargaining functions, Pet. Reply Br. 2 n.1, and it is not a named petitioner before this Court.

tory labor exemption to the antitrust laws recognized by this Court in *Local Union No. 189, Amalgamated Meat Cutters* v. *Jewel Tea Co.*, 381 U.S. 676 (1965), and *Connell Construction Co.* v. *Plumbers & Steamfitters, Local Union No. 100*, 421 U.S. 616 (1975).

On cross-motions for summary judgment, the district court held the nonstatutory labor exemption applicable only until negotiations over the restraints on player mobility had reached impasse; it subsequently found that the parties had reached impasse and that, accordingly, the exemption no longer immunized respondents' conduct. Before petitioners' antitrust challenge could be tried on the merits, respondents appealed the district court's interlocutory order to the court of appeals pursuant to 28 U.S.C. 1292(b). The court of appeals reversed, holding that the antitrust exemption continued after impasse as long as "the labor relationship continues." Pet. App. 18a.

1. Restrictions on the ability of players to move among teams have long been a source of tension between respondents and the players. Understanding the legal dispute over the current system necessitates a brief discussion of its predecessor.

The "Rozelle Rule," in effect from 1963 to 1976, generally required a team signing a contract with a player formerly employed by another team to pay compensation to that team as set by the Commissioner. That compensation, in the Commissioner's discretion, could include one or more players or future draft choices from the acquiring team. Pet. App. 37a n.3. Fear of losing veteran players or first-round draft choices discouraged teams from hiring players who had worked for other teams. From 1963 to 1976, only four players signed with other teams after their contracts expired. P. Staudohar, *The Sports Industry and Collective Bargaining* 87-88 (2d ed. 1989).

In 1974, differences over player mobility led the players' union to call a strike. R. Berry, W. Gould & P. Staudohar, *Labor Relations in Professional Sports* 125

(1986). Although most players initially complied with the strike call, rookies and free agents reported to training camp. After 44 days, the strike was broken and the remaining strikers returned to camp. *Id.* at 97.

The players nonetheless continued to challenge the Rozelle Rule in court. *Mackey* v. *NFL*, 407 F. Supp. 1000 (D. Minn. 1975), modified and affirmed, 543 F.2d 606 (8th Cir. 1976), cert. dismissed, 434 U.S. 801 (1977). In *Mackey*, the players contended (and the district court agreed) that the Rozelle Rule was a per se violation of Section 1 of the Sherman Act, 15 U.S.C. 1, because it constituted an employer-imposed group boycott or refusal by teams to deal with the players. 407 F. Supp. at 1005, 1009-1010. On appeal, the Eighth Circuit agreed that the Rozelle Rule violated the Sherman Act, but analyzed the restraint under the Rule of Reason. 543 F.2d at 620-622.

2. Although the defendants in *Mackey* insisted that the Rozelle Rule did not violate the Sherman Act, their principal contention then, as now, was that restrictions imposed on player mobility are immune from Sherman Act scrutiny under the nonstatutory labor exemption to the antitrust laws.

The nonstatutory exemption to the federal antitrust laws is now well established in our law. It is entirely a judicial construct. This implied exemption "has its sources in the strong labor policy favoring the association of employees to eliminate competition over wages and working conditions." *Connell*, 421 U.S. at 622. To be sure, Congress has provided labor a *statutory* exemption from the antitrust laws. But that exemption only immunizes the existence of unions and certain activities undertaken by unions acting unilaterally and in their own interests to eliminate competition in the labor market. See Clayton Act §§ 6, 20, 15 U.S.C. 17, 29 U.S.C. 52; Norris-LaGuardia Act, 29 U.S.C. 104, 105, 113; see also *Connell*, 421 U.S. at 621-622; *United States* v. *Hutcheson*, 312 U.S. 219 (1941). The statutory labor exemp-

tion does not extend to "concerted action or *agreements between unions and nonlabor parties.*" *Connell*, 421 U.S. at 622 (emphasis added); see *Hutcheson*, 312 U.S. at 232. For that reason, the statutory exemption does not insulate even a collective bargaining agreement from the antitrust laws. See *United Mine Workers* v. *Pennington*, 381 U.S. 657, 662 (1965).

To "accommodat[e] * * * the congressional policy favoring collective bargaining under the NLRA [National Labor Relations Act] and the congressional policy favoring free competition in business markets," *Connell*, 421 U.S. at 622, this Court has concluded that the antitrust laws must recognize a further *nonstatutory* labor exemption applicable to certain conduct in which employers participate. Not only are "some union-employer agreements * * * accorded a limited nonstatutory exemption from antitrust sanctions," *ibid.*, but collective bargaining agreements eliminating competition among employers in a multi-employer bargaining unit with respect to terms of employment are also generally immune from the antitrust laws under the nonstatutory exemption, see *ibid.*; *Jewel Tea*, 381 U.S. at 689-690; *Pennington*, 381 U.S. at 664-665.

In *Mackey*, the Eighth Circuit held that the nonstatutory labor exemption did not shield the Rozelle Rule from the Sherman Act because the Rule was unilaterally imposed by the NFL and thus was not "the product of bona fide arm's-length negotiation." 543 F.2d at 615. The court of appeals found substantial evidence to support the district court's conclusion that "the parties' collective bargaining history reflected nothing which could be legitimately characterized as bargaining over the Rozelle Rule." *Ibid.*; see *id.* at 615-616.

3. As a "direct result" of their victory in *Mackey* and another case, *Alexander* v. *NFL*, 1977-2 Trade Cas. ¶ 61,730 (D. Minn. 1977), the players and their union achieved "a multimillion dollar cash settlement and the owners' promise to negotiate a new collective bargaining

agreement." R. Berry, W. Gould & P. Staudohar, *supra*, at 98. In 1977, the players' union and the NFL signed a collective bargaining agreement that, among other things, replaced the Rozelle Rule with the Right of First Refusal/Compensation system which the players challenge in this litigation. Under the new system,

> every NFL club retains rights to "its players" even though, in the case of veteran free agents, contractual rights to a player no longer exist. When a veteran player's contract has expired and a competing NFL club makes an offer to that player, the player's old team may keep the player simply by matching the competing offer; the player's old club therefore is said to have a "right of first refusal" as to the player's services. If the competing offer is large enough, and the club to which the player was previously under contract does not choose to match a competing offer, the old club will receive draft choice "compensation" which may be extremely costly to the acquiring club.

Pet. App. 37a.

Although the Right of First Refusal/Compensation system is characterized by less discretion than the Rozelle Rule—for example, the system quantifies the compensation payable in future draft choices by reference to the acquired player's experience and salary level, rather than leaving it to the Commissioner's judgment in each case—the mobility of players subject to the rule did not increase substantially. Pet. App. 39a. At the expiration of the 1977 contract in 1982, therefore, the players' union mounted a 57-day strike. At the conclusion of the strike, the system was modified by increasing the salary level at which draft choice compensation was triggered.

The modified rule incorporated in the 1982 collective bargaining agreement, however, did not produce the mobility for which the players hoped. Pet. App. 39a.[2] When

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[2] From 1977 to 1987, only one free agent signed with another team. P. Staudohar, *supra*, at 89.

the 1982 contract expired in 1987, the players' union sought further modifications in the Right of First Refusal/Compensation system. Negotiations failed to reach an accord on that issue, and the players' union called another strike. After 24 days, the strike was broken and the players resumed work without a contract. No contract has since been signed. Pet. App. 40a.

4. On the day the 1987 strike ended, petitioners and the players' union filed suit against respondents, claiming, *inter alia*, that the Right of First Refusal/Compensation system violates Section 1 of the Sherman Act, 15 U.S.C. 1.[3] Petitioners moved for partial summary judgment and an injunction against respondents' continued implementation of the Right of First Refusal/Compensation system. Pet. App. 35a, 40a. Respondents filed a cross-motion for summary judgment seeking a declaration that the challenged restraints were immune from antitrust scrutiny by virtue of the nonstatutory labor exemption. *Id.* at 35a, 43a.

On January 29, 1988, the district court ruled that the player restraints, having been included in the 1982 labor contract as a result of good faith collective bargaining, were exempt from the antitrust laws by virtue of the nonstatutory labor exemption for the duration of the contract. It further ruled that the exemption continued after "expiration of the collective bargaining agreement until the parties reach impasse *as to that issue*." Pet. App. 54a; see *id.* at 47a-50a. Impasse is the point at which the parties, "following intense, good faith negotiations," have "exhausted the prospects of concluding an agreement." *Id.* at 54a. Because the National Labor Relations Board was then considering whether negotiations had reached impasse, in connection with the NFL's charge that the union was not bargaining in good faith, the district court stayed proceedings until the Board ruled. *Id.* at 56a-57a.

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[3] The players also challenged the College Draft and the standardized Player Contract. They sought injunctive relief and damages on all counts.

The Board's General Counsel thereafter concluded that the parties had reached a "bona fide impasse in negotiations," and therefore dismissed the NFL's charge (and an amended charge). *NFL Players' Ass'n*, Case 2-CB-12117, Advice Mem. at 8. On June 17, 1988, the district court, "accord[ing] some weight" to the General Counsel's views, 6/17/88 Tr. 3-4, agreed that the parties had reached an impasse on the issue of player restraints and therefore held that continued imposition of those restraints would be subject to the antitrust laws. *Powell* v. *NFL*, 690 F. Supp. 812, 814 (D. Minn. 1988). The district court denied petitioners' motion for a preliminary injunction, however, in light of the requirements of the Norris-LaGuardia Act (which generally prohibits the courts from granting injunctions in labor disputes, 29 U.S.C. 101, 107) and the court's own determination that an injunction would "irreparably harm the owners and have a deleterious effect upon professional football generally" and "wholly subvert the collective bargaining process." 690 F. Supp. at 816, 817.

On January 6, 1989, the district court granted respondents' motion to certify its January 29, 1988, order for interlocutory appeal under 28 U.S.C. 1292(b). That order was recertified, at respondents' request, on February 17, 1989.

5. The court of appeals accepted the interlocutory appeal. In a divided ruling, it reversed the judgment of the district court and remanded with instructions to enter judgment for respondents.

The majority disagreed with the district court that the nonstatutory labor exemption ends at impasse. It noted that impasse in labor negotiations is common and usually temporary, Pet. App. 9a-10a, and that bargaining is governed by "a comprehensive array of labor law principles" both before and after impasse, *id.* at 12a-13a, 15a. In addition, "disputes over employment terms and conditions are not the central focus of the Sherman Act." *Id.* at 13a. Having accepted the "level playing field" of

the labor arena, the court concluded, the parties should be required to continue to fight on it, "so that bargaining and the exertion of economic force may be used to bring about legitimate compromise." *Id.* at 17a.

The court acknowledged that respondents had modified the Right of First Refusal/Compensation system (by reducing the number of players to which it applied) after the district court found that the parties had reached an impasse in negotiations over player restraints. Pet. App. 17a & n.10. In spite of the unilateral nature of this change, the court of appeals ruled that the players and their union could not challenge the modified system because they did not contend that respondents had proposed or implemented the change in bad faith. *Id.* at 17a. Although the court insisted that "this does not entail that * * * management is forever exempt" from the antitrust laws, it refused to "look into the future and pick a termination point." *Id.* at 17a-18a. The court was "satisfied that as long as there is a possibility that proceedings may be commenced before the Board, or until final resolution of Board proceedings and appeals therefrom, the labor relationship continues and the labor exemption applies." *Id.* at 18a.

Senior Circuit Judge Heaney dissented. He agreed with the district court that the labor exemption terminates at impasse. Pet. App. 21a. In his view, "the end result of the majority opinion is that once a union agrees to a package of player restraints, it will be bound to that package forever unless the union forfeits its bargaining rights." *Id.* at 23a.

The court of appeals, by a 7-2 vote, denied rehearing en banc. Chief Judge Lay and Judge McMillian dissented from that denial on the ground of a conflict with *Mackey*. Pet. App. 27a-32a.

DISCUSSION

This case presents a difficult question of first impression in this Court: whether, and for what period after a collective bargaining agreement expires, the nonstatutory labor exemption to the antitrust laws shields a labor market restraint embodied in the expired agreement. The answer to that question is not supplied by this Court's decisions in *Pennington*, *Jewel Tea*, or *Connell*. Each of those cases determined whether the nonstatutory labor exemption immunized from antitrust scrutiny a challenged restraint incorporated in a collective bargaining agreement. This case presents the different, but related, question whether such an "exemptable" restraint remains insulated from the antitrust laws after the collective bargaining agreement expires.

As in this Court's earlier cases, resolution of that question requires harmonization of the fundamental national policies embodied in the labor laws and the antitrust laws. This Court repeatedly has recognized that, while "[t]he basic sources of organized labor's exemption from federal antitrust laws are §§ 6 and 20 of the Clayton Act * * * and the Norris-LaGuardia Act, * * * a proper accommodation between the congressional policy favoring collective bargaining under the NLRA and the congressional policy favoring free competition in business markets requires that some union-employer agreements be accorded a limited nonstatutory exemption from antitrust sanctions." *Connell*, 421 U.S. at 621-622; see *id.* at 621-623; cf. *Boyle* v. *United Technologies Corp.*, 487 U.S. 500, 504-513 (1988).

In order to avoid improper intrusion into the legislative policymaking role, the courts, in fashioning this "limited nonstatutory exemption," should be mindful of the principle that implied exemptions to the antitrust laws are disfavored. In consequence, those judicially created exceptions to the critical mandate of the antitrust laws should be no broader than clearly necessitated by

the public policy requiring their recognition. See, *e.g.*, *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 105-106 (1980); *Federal Maritime Comm'n* v. *Seatrain Lines, Inc.*, 411 U.S. 726, 733 (1973); *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 357 (1963).

In light of these principles, we believe that the court of appeals correctly rejected respondents' suggestion that the antitrust laws have no role to play with respect to pure labor market restraints. At the other extreme, the lower courts were likewise correct to reject petitioners' contention that the antitrust laws become applicable immediately upon expiration of the collective bargaining agreement if the union does not consent to continuation of a restraint. But while the court of appeals correctly rejected the polar positions pressed by the parties, its own formulation of the nonstatutory labor exemption was, we believe, overly expansive.

1. Respondents suggest that, because only a labor market restraint is involved, it should make no difference to the antitrust exemption whether an employer, a union, or both in concert seek to eliminate competition. Citing *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469 (1940), respondents submit that the antitrust laws are not concerned with restraints on competition in labor markets, if there is no effect on a "product market." Br. in Opp. 14-15. The Court in *Apex*, relying on Section 6 of the Clayton Act, 15 U.S.C. 17, observed that "restraints on the sale of the employee's services to the employer, however much they curtail the competition among employees, are not in themselves combinations or conspiracies in restraint of trade or commerce under the Sherman Act." 310 U.S. at 502-503.

But the Court's statement in *Apex* was made in a suit by an employer against a union and its officials. And Section 6 of the Clayton Act, although it provides that

"[t]he labor of a human being is not a commodity or article of commerce," focuses on protection of unions and expressly immunizes from the antitrust laws only the existence of unions and certain union activities. The federal courts therefore have generally concluded (correctly, in our view) that neither *Apex* nor Section 6 puts collective action by employers to restrict competition in a labor market outside the scope of the antitrust laws. See, *e.g.*, *Mackey*, 543 F.2d at 616-618; *McCourt* v. *California Sports, Inc.*, 600 F.2d 1193, 1197 n.7 (6th Cir. 1979); *Gardella* v. *Chandler*, 172 F.2d 402, 408 (2d Cir. 1949) (L. Hand, J.); *id.* at 413 (Frank, J.); *Smith* v. *Pro-Football, Inc.*, 420 F. Supp. 738, 742 (D.D.C. 1976), aff'd in part, rev'd in part, 593 F.2d 1173 (D.C. Cir. 1978); *Cordova* v. *Bache & Co.*, 321 F. Supp. 600 (S.D.N.Y. 1970). Those decisions comport with decisions of this Court that, while not referring specifically to the labor exemption, hold that employees may raise antitrust challenges to collective employer action with respect to terms of employment. *Radovich* v. *NFL*, 352 U.S. 445 (1957); *Anderson* v. *Shipowners Ass'n*, 272 U.S. 359 (1926). The court of appeals thus properly rejected respondents' suggestion that employer-imposed restraints affecting only labor markets are beyond the scope of the antitrust laws.

2. The court of appeals was also correct to reject petitioners' contention that the nonstatutory labor exemption protects only restraints to which the union currently agrees—a position that would dictate termination of the nonstatutory labor exemption immediately upon expiration of a collective bargaining agreement (at least if the union has made it clear that it will not agree to continuation of the provision). See Pet. 12; Pet. Reply Br. 5. That view affords insufficient deference to the "federal policy favoring collective bargaining." *Connell*, 421 U.S. at 626. In particular, it cannot be reconciled with the obligation of employers under the labor laws to maintain the terms of employment established by an ex-

pired collective bargaining agreement until impasse. *NLRB* v. *Katz*, 369 U.S. 736, 742-743 (1962). If the antitrust exemption were withdrawn before impasse, and employers feared that continued adherence to particular terms pending negotiation of a new agreement would constitute an antitrust offense, they could find themselves in a dilemma: modify the objectionable terms (and risk committing an unfair labor practice, because the NLRA forbids unilateral changes in working conditions prior to impasse, see *Laborers Health & Welfare Trust Fund* v. *Advanced Lightweight Concrete Co.*, 484 U.S. 539, 544 n.6 (1988)); or adhere to the terms (and risk treble damages under the antitrust laws).

It is true that employers would not violate the labor laws by unilaterally changing terms and conditions of employment prior to impasse with union concurrence. But allowing the union to dictate termination of the antitrust exemption upon contract expiration would tend to undermine the collective bargaining process. When unions and employers agree to a contractual provision, they know that it will continue in effect at least until impasse, should the current contract expire before a new contract is negotiated. That expectation plays an important role in facilitating collective bargaining. "'Freezing the status quo ante after a collective agreement has expired promotes industrial peace by fostering a non-coercive atmosphere that is conducive to serious negotiations on a new contract.'" *Laborers Health & Welfare Trust Fund* v. *Advanced Lightweight Concrete Co.*, 484 U.S. at 544 n.6 (quoting court of appeals' opinion). Terminating the antitrust exemption immediately upon expiration of the collective bargaining agreement would gratuitously intrude force before the opportunity for a non-coercive solution has been exhausted. See *Bridgeman* v. *National Basketball Ass'n*, 675 F. Supp. 960, 965-966 (D.N.J. 1987). Accordingly, the courts below correctly held that

the nonstatutory labor exemption should continue after the contract expires.[4]

3. a. We believe, however, that the court of appeals erred in holding that the nonstatutory labor exemption continued indefinitely beyond impasse. The court of appeals reasoned—in light of the "comprehensive array of remedies" provided by labor law "to management and union, even after impasse," Pet. App. 15a—that the nonstatutory labor exemption must protect any restriction "conceived in an ongoing collective bargaining relationship." *Id.* at 18a.[5] Although the court of appeals asserted that it was not holding that management was "forever exempt," its opinion suggests no point short of the end of the "ongoing collective bargaining relationship" at which the exemption would terminate. *Id.* at 17a-18a. Although this view would obviously be within the broad range of policy choices available to Congress, it is not properly confined as an implied exemption necessitated by the labor policy Congress has thus far enacted.

Neither the text nor the history of the NLRA fairly suggests that Congress implicitly intended broadly to deprive unionized workers of the antitrust laws' protection from employer-imposed restraints on competition in the labor market. The text of the NLRA does not mention the antitrust laws, and the legislative history demonstrates no intent to restrict the preexisting rights of workers as the price of participation in a collective bargaining relationship—rights that presumably would continue to exist for other, non-unionized workers. To the contrary, the predominant thrust of the statute (and of related enactments such as the Norris-LaGuardia Act)

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[4] This case does not present the question whether the nonstatutory labor exemption reaches restraints to which the union has never agreed. Petitioners do not dispute that the 1982 agreement was a collective bargaining agreement negotiated at arm's length and in good faith.

[5] It included in that category the modifications to the player restrictions imposed by the respondents without union agreement. Pet. App. 17a & n.10.

is to expand the protection afforded employees. While the labor laws are, of course, designed to promote and encourage the process of collective bargaining, there is insufficient suport in that general statutory policy for the court of appeals' conclusion that an antitrust exemption should shield an employer-imposed restraint that originated in an expired contract as long as the collective bargaining relationship exists. As a policy judgment, Congress could reasonably conclude that so comprehensive an exemption is desirable and should be enacted. But the role of the courts is not similarly to choose among rational predictive policy alternatives; it is instead to fashion an implied exemption no broader than clearly necessary to the successful functioning of the statutory scheme.

b. On the other side of the scale weighs the antitrust laws' proscription of anticompetitive restraints. The immunity conferred by the nonstatutory labor exemption is of significance principally where the challenged restraints would otherwise violate the antitrust laws. By hypothesis, then, we should assume—as the Eighth Circuit found in *Mackey*—that restrictions on player mobility injure the players in their business or property under the antitrust laws.[6]

We should also recall (see p. 9, *supra*) that restrictions on player mobility are not exempt from the antitrust laws, but only "exemptable" by means of a collective bargaining agreement. For that reason, the prospect of vulnerability to an antitrust claim is not an alien element that would be introduced into the collective bargaining process for the first time upon termination of the implied

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[6] There has been no finding in this case that the Right of First Refusal/Compensation system violates the Sherman Act, and we express no opinion on that issue. In *Mackey*, however, the Eighth Circuit found "ample evidence to support the district court's findings that plaintiffs have been injured in their business or property" by the Rozelle Rule, which preceded the Right of First Refusal/Compensation system at issue in this litigation. 543 F.2d at 623.

exemption. To the contrary, the value of the nonstatutory labor exemption is one of the benefits the respondents bargained for and received when the parties signed the 1977 collective bargaining agreement. In the absence of that agreement, the Right of First Refusal/Compensation system would have been open to challenge under the Sherman Act, just as the Rozelle Rule had been challenged (successfully) in *Mackey*. By incorporating the Right of First Refusal/Compensation system into the 1977 collective bargaining agreement, respondents purchased antitrust immunity, presumably in exchange for an agency shop, pension and insurance benefits, or some other consideration valued by the players. In essence, the players bargained away their antitrust chose in action (and the ongoing injury they presumably suffered) as a quid pro quo for compensation in some other form.

By extending the nonstatutory labor exemption past the time when the employers may unilaterally diminish or rescind elements of that quid pro quo (as they are permitted to do after impasse has been reached), the court of appeals has created an inherently destabilizing asymmetry between the initial collective bargaining agreement and all successor agreements. Its rule effectively gives the party benefitting from a potentially anticompetitive restraint (the respondents, in this case), the benefit of the antitrust exemption without having to pay for it. As Circuit Judge Heaney pointed out in dissent, "the majority has intervened to remove the players' rights under the antitrust laws from the bargaining table." Pet. App. 25a.

Under the rule adopted by the court of appeals, the party burdened by the anticompetitive restraint (in this case, the players, as represented by their union) would apparently be relegated to three unsatisfactory options: (1) accede to the other side's terms (which are unlikely to represent a legitimate compromise because the other side is unlikely to pay for an antitrust exemption it can continue to enjoy for free); (2) call a strike (albeit with

diminished chance of success because one of the levers available to achieve the initial contract—the credible threat of antitrust damages—is removed by perpetuation of the nonstatutory labor exemption after impasse); or (3) terminate the collective bargaining relationship and start from scratch. It is questionable whether that result is even appropriately compatible with the policies of the labor laws. It surely is not sufficiently essential to the successful implementation of those policies to warrant a judicial finding of an implied exemption from the normal operation of another duly enacted Act of Congress (the Sherman Act).

c. An analytically logical point for termination of the implied immunity flowing from an expired collective bargaining agreement is when the parties have reached an impasse in their negotiations over a new collective agreement. "The definition of 'impasse' is understandable enough—that point at which the parties have exhausted the prospects of concluding an agreement and further discussions would be fruitless." *Laborers Health & Welfare Trust Fund* v. *Advanced Lightweight Concrete Co.*, 484 U.S. at 543 n.5 (quoting R. Gorman, *Basic Text on Labor Law: Unionization and Collective Bargaining* 448 (1976)). At impasse, additional tools, economic and legal, are ordinarily brought into play to prompt the parties to reconsider their positions and come to an understanding. For example, employers are free under the labor laws to make unilateral changes in the terms of employment after impasse, so long as the changes have been offered as good faith proposals in bargaining. *Charles D. Bonanno Linen Service* v. *NLRB*, 454 U.S. 404, 415-416 n.9 (1982). Such unconsented changes, if made prior to impasse, would be unfair labor practices remediable in Board proceedings. Moreover, members of a multi-employer bargaining unit are free to negotiate individual agreements on an interim basis with the union after impasse. *Ibid.* Since the labor laws authorize and contemplate independent employer action and changes in the

terms of employment at impasse, labor policy no longer requires that employers be comprehensively shielded from the antitrust laws if they elect collectively to maintain or enforce provisions inconsistent with the antitrust laws after that time.

Although impasse therefore seems the theoretical fulcrum for termination of the implied immunity, certain practical difficulties would be presented by a rule dissolving the immunity immediately upon impasse. It is not always clear even in retrospect—and certainly not always immediately clear to the parties—precisely when impasse occurs. Moreover, the labor laws, which are designed to promote collective bargaining and which prohibit unilateral change before impasse but allow it after impasse, seem to prefer caution, rather than prematurity, in concluding that further bargaining is futile. For these reasons, there is justification in labor policy for the implied immunity to endure after impasse for such time as would be reasonable in the circumstances for the employer to take steps to ascertain, upon advice of counsel, that impasse has in fact occurred and to adjust his business operations so as to eliminate the previously immunized restraint.

In no event, however, should immunity continue once the employer has made a unilateral, post-impasse change in the provision at issue. Adoption of such a change (which would constitute an unfair labor practice if made prior to impasse) amounts to a tacit admission that the employer (1) has concluded that impasse has occurred and (2) has had sufficient time to act on that conclusion. Here, respondents' unilateral modification of the Right of First Refusal/Compensation system (see p. 8, *supra*) appears to be just such a unilateral change.

4. The court of appeals' decision, although erroneous, does not conflict with any decision of this Court, nor is there a conflict in the circuits. Moreover, reconciliation of the two fundamental and potentially inconsistent national policies embodied in the antitrust laws and the

labor laws necessarily involves some speculation about the practical operation of the collective bargaining process. Thus, the issue involved in this case is one on which additional experience in the lower courts could shed light.

At the same time, the court of appeals' error is a matter of serious consequence. Its unjustified extension of the nonstatutory labor exemption is likely to destabilize labor-management relations and make collective bargaining agreements more difficult to reach. The potential for mischief is quite broad. It includes professional football, which is a multi-billion dollar business, and professional hockey and basketball, where the leagues also impose restraints on player movement. See *Bridgeman* v. *National Basketball Ass'n, supra; Philadelphia World Hockey Club Inc.* v. *Philadelphia Hockey Club, Inc.*, 351 F. Supp. 462 (E.D. Pa. 1972).[7] It includes the entertainment industry generally, which has an economic structure similar to professional sports.[8] And it conceivably includes the more than 600 collective bargaining relationships involving multi-employer associations, which in turn

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[7] Professional baseball presumably is unaffected, since it is not subject to the antitrust laws. *Flood* v. *Kuhn*, 407 U.S. 258 (1972).

[8] According to Professor Staudohar, "professional sport is clearly within the ambit of the organized entertainment industry in its industrial relations structure." P. Staudohar, *supra*, at 6-7. "Both [the entertainment industry and professional sports] are subject to the 'star system,' in which exceptionally talented people dominate the worker hierarchy." *Id.* at 7. Like professional league sports, the entertainment industry is characterized by multi-employer bargaining units. See, *e.g.*, *American Broadcasting Co.* v. *Writers Guild*, 437 U.S. 411, 413-414 (1978) (describing the Association of Motion Picture & Television Producers, Inc., the multi-employer bargaining association representing motion picture and television film producers); *IATSE, Local 659*, 197 N.L.R.B. 1187, 1188 (1972) (describing the Association of Motion Picture Producers, Inc., a multi-employer bargaining unit representing 70 employer-producers), enforced, 477 F.2d 450 (D.C. Cir. 1973); *Barr* v. *Dramatists Guild, Inc.*, 573 F. Supp. 555, 557 (S.D.N.Y. 1983) (describing The League of New York Theaters and Producers, Inc., a multi-employer bargaining unit of theater producers, owners, and operators in New York City).

cover more than three million employees. Pet. App. 63a-65a.

Although the district court's order is interlocutory, no issues remain to be resolved on remand that bear on when the nonstatutory labor exemption terminates. Nor will resolution of those issues develop a record that will aid in resolution of that issue. Neither respondents (in appealing to the court of appeals), nor petitioners (who seek review in this Court), have identified any further fact finding necessary to determine the proper accommodation of labor and antitrust policies. We therefore believe that the interlocutory nature of the court of appeals' decision is no obstacle to this Court's review. Cf. *Kansas & Missouri* v. *Utilicorp United, Inc.*, 110 S. Ct. 2807, 2811 (1990). Finally, it is unlikely that a contract settlement will be reached since the players' union has foresworn its status as bargaining representative.[9] On balance, we believe that the petition presents a question of sufficient importance to the proper functioning of the labor and antitrust laws, and to the maintenance of industrial peace, that the Court should not await emergence of a conflict in the circuits before granting review.

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[9] On November 6, 1989, five days after the panel's decision, the players' union wrote to the NFL that it "has voted to abandon bargaining rights and begin the decertification process." Pet. App. 62a. On March 30, 1990, the NFL filed suit in district court for a declaratory judgment that the players' union's "purported decertification and abandonment of bargaining rights is ineffective to terminate the labor exemption recognized by the Eighth Circuit." Complaint for Declaratory Judgment at 19, *The Five Smiths, Inc., et al.* v. *National Football League Players Ass'n*, No. 4-90-CV-261 (D. Minn.).

CONCLUSION

The petition for a writ of certiorari should be granted.

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OCTOBER TERM, 1990

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v.

NATIONAL FOOTBALL LEAGUE, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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SUPPLEMENTAL BRIEF FOR RESPONDENTS IN OPPOSITION TO THE BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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The prudential considerations acknowledged by the Solicitor General (Br., pp. 17-19) themselves call for denial of the petition for certiorari and, in addition, there are evident errors in the Solicitor General's analysis of the issues raised by the decision of the court below.

1. In tendering this case, petitioners argued that the labor exemption terminates when a collective bargaining agreement expires. The courts below squarely rejected this contention, as does the Solicitor General. (Br., pp. 11-12). The district court held that the exemption terminates at impasse, a position rejected by both the Court of Appeals and the Solicitor General. (Br., p. 17). In-

stead, the Solicitor General urges this Court to reach a result not suggested by any party and not considered, let alone adopted, by any judge below—that immunity should terminate because the employer, after good faith bargaining, initiates a post-impasse change entirely in accordance with the governing labor laws.

The Solicitor General acknowledges (Br. pp. 17-18), that the Eighth Circuit's opinion does not conflict with any decision of either this Court or other appellate courts, and it is obvious that further experience with the issues in the lower courts would be helpful. (*See* Br. p. 18). It is significant in this respect that, despite the Solicitor General's speculation as to the impact of the decision below on labor-management relations, this case is one of first impression—the issues raised by petitioners here have not previously surfaced, even though successful bargaining in a multi-employer context has been long established in professional sports and elsewhere. The reason, we suggest, is pervasive recognition that, contrary to the Solicitor General's assertion, application of the antitrust laws would be destabilizing rather than helpful in furthering the collective bargaining process.[1]

2. The Solicitor General's brief (p. 16) rests on the premise that an impasse signals the end of the collective

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[1] The Solicitor General is also incorrect in indicating (Br., p. 19) that settlement of this labor dispute through collective bargaining is not a realistic option. The National Football League Players Association ("NFLPA"), which is funding this litigation, has indicated that a settlement of this litigation "could mirror a collective bargaining agreement." *USA Today*, Oct. 4, 1990, at 7C. Moreover, issues as to the continued status of the NFLPA as the collective bargaining representative of NFL players remain to be litigated in this case, as well as in McNeil v. National Football League, Civ. No. 4-90-476 (D. Minn.), and Five Smiths, Inc. v. National Football League Players Ass'n, Civ. No. 3-90-177 (D. Minn.). Contrary to the Solicitor General's suggestion (Br., p. 1, n.1), the NFLPA was not dismissed from this case because of its purported abandonment of collective bargaining rights, but because it lacked standing to pursue an antitrust claim.

bargaining process. In one of the very cases cited in this discussion, however, *Charles D. Bonanno Linen Service, Inc.* v. *NLRB*, 454 U.S. 404 (1982), this Court affirmed the contrary conclusions of the NLRB. The Court there held that an impasse in collective bargaining negotiations is not an appropriate occasion for permitting individual employers to withdraw from a multi-employer bargaining unit. The Court explained:

> "As a recurring feature in the bargaining process, impasse is only a temporary deadlock or hiatus in negotiations 'which in almost all cases is eventually broken, through either a change of mind or the application of economic force.' Furthermore, an impasse may be 'brought about intentionally by one or both parties as a device to further, rather than destroy, the bargaining process.' Hence, 'there is little warrant for regarding an impasse as a rupture of the bargaining relation which leaves the parties free to go their own ways.'" 454 U.S. at 412 (quoting Board's opinion below).

The Solicitor General's suggestion that impasse is "[a]n analytically logical point" (Br., p. 16) for termination of the labor exemption fails to take into account, as both this Court and the NLRB have recognized, that the collective bargaining process continues after impasse, which is merely a "temporary deadlock or hiatus in negotiations."[2] Moreover, the impasse test does not, as the So-

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[2] In *Bonanno*, the Court noted that permitting employers to withdraw at impasse could operate to precipitate impasses that otherwise would not occur. *See* 454 U.S. at 412-13 n.8. The same defect inheres in the Solicitor General's conclusion that the labor exemption should terminate following impasse, in that unions would be induced to declare that negotiations are at an impasse, rather than to continue to negotiate, in order for the antitrust threat to be available to them. That is precisely what happened in this case. One day after the district court opined that the labor exemption would not terminate until impasse, the NFLPA announced the existence of an impasse and refused to participate in additional negotiations. See Pet. App. 4a.

licitor General ultimately acknowledges (Br., p. 17), provide a workable standard that could be used by employers to guide their conduct and to avoid treble damage liability. The Solicitor General's attempt to take these concerns into account would involve the parties in considerable guesswork and the courts in lengthy and burdensome litigation.

3. Similarly, the Solicitor General fails to appreciate that employers are not free at impasse to alter terms and conditions of employment in any manner they see fit; any change must be consistent with offers made in good faith to the union during the collective bargaining process. *See, e.g., Laborers Health & Welfare Trust Fund* v. *Advanced Lightweight Concrete Co., Inc.*, 484 U.S. 539, 543-44 n.5 (1988). The Solicitor General is also mistaken in believing that applying the antitrust laws following impasse in this case is necessary because, otherwise, the NFL would be "benefit[ting] [from] the antitrust exemption without having to pay for it." (Br. p. 15). The fact is that NFL players are continuing to receive numerous benefits of the expired collective bargaining agreement; it would be unfair for the NFL clubs not to receive their own corresponding benefits under that agreement. The requirement that, at impasse, employers must act in good faith and in accordance with their prior offers is a significant restriction on their ability to "unilaterally diminish or rescind" those elements of an expired collective bargaining agreement that benefit employees. (Br., p. 15).

4. The Solicitor General twice refers to "employer-imposed restraints." (Br., pp. 13, 14). That is not the case here. The restraint at issue, the NFL's Right of First Refusal/Compensation system, was agreed to by the NFLPA, and has remained unchanged since its incorporation into the now-expired collective bargaining agreement. As noted in the Solicitor General's brief (p. 8), the system now applies only to a reduced number of players. The system itself, however, is unchanged, and

cannot fairly be characterized as an "employer-imposed restraint."

5. The "proper accommodation between the congressional policy favoring collective bargaining under the NLRA and the congressional policy favoring free competition in business markets," *Connell Construction Co.* v. *Plumbers & Steamfitters, Local Union No. 100*, 421 U.S. 616, 621-22 (1975), is, indeed, "a difficult question." (Br., p. 9). This question is not, however, presented in this case, for it is undisputed that the restraint at issue here does not affect in any way "competition in business markets"; the restraint's only effect is in a labor market. It is for this reason, not the reason suggested by the Solicitor General (*id.*), that this case does not implicate *Connell* and this Court's other labor exemption cases. *See Wood* v. *National Basketball Association*, 809 F.2d 954, 962-63 (2d Cir. 1987); *cf.* Jacobs & Winter, *Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage*, 81 Yale L.J. 1, 21-28 (1971). This is a labor dispute plain and simple that should be resolved by collective bargaining.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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